

A SELECTION
OF
LEADING CASES IN EQUITY

With Notes.

BY
FREDERICK THOMAS WHITE
AND
OWEN DAVIES TUDOR.

SEVENTH EDITION

BY
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"Pray let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad."—*Per Lord NOTTINGHAM in Duke of Norfolk's Case*, 3 Ch. Cases, 33.

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PREFACE TO THE SEVENTH EDITION.

IN their Preface to the first edition of these Leading Cases the Editors wrote as follows:—

“ In the notes an attempt has been made to develop the principles laid down or acted upon in the cases, and to collect the recent authorities; but as the nature of the work would not permit that the notes should be complete essays upon the different subjects treated of, they have been principally confined to the points decided in the cases, to which, in fact, they are only intended to be subsidiary.”

These and other characteristics of this work I have endeavoured to keep. But as retrenchment of bulk has been an imperative necessity, some of the more lengthy statements of arguments in the leading cases, and some of the more diffuse notes, have been shortened or omitted.

Some changes have been made in the arrangement of the cases, in accordance with the views of the original Authors, as stated in their Preface to the first edition, and they have now been grouped under headings referring to the principal subject-matter of the cases, and these headings have been arranged in alphabetical order. The notes to the cases have also been divided into parts, a reference to which is given at the commencement of each set of notes.

In editing a work of this kind the chief difficulty with regard to the notes is to determine their limit. To deal thoroughly with the subjects to which most of them relate would require a volume instead of a few pages. It is, therefore, necessary to select leading points, and however carefully this may be done it is impossible to feel sure that the reasonable expectations of others have been duly provided for.

Burrowes v. Lock, 10 V. 470, 8 R. R. 33, 856, has been substituted for *Savage v. Foster* as the leading case on Estoppel by Representation. *Huntingdon v. H.* has been omitted. *Wilson v. W.*, as to the effect of Articles of Separation between Husband and Wife, has been added.

The labour of re-writing the notes and collecting cases has been necessarily divided, but all the proofs have been revised by me and many by Mr. W. F. Phillpotts, to whom I am also indebted for the articles relating to Mortgages, Notice, Purchaser for value without Notice, and the duties and liabilities of Trustees.

I am greatly indebted to Mr. Savill Vaizey for reading the sheets of *Glenorchy v. Bosville*, to Mr. J. B. Matthews for the use of his notes upon the sixth edition, to Mr. W. A. Bewes, to Mr. W. B. Lindley, to Mr. Brickdale, to Mr. Godefroi and to Mr. E. P. Hewitt for permission to use their respective text-books, and also to the numerous other authors whose works have been used for reference.

T. S.

September, 1897.

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ADDENDA ET CORRIGENDA.

VOLUME I.



- Page 77, note (a), add "*Re Pitcairn*, (1896) 2 Ch. 199."
- " 78, note (a), add "*Re Pitcairn*, (1896) 2 Ch. 199."
- " 78, note (y), "*Craig v. Wheeler*, followed in *Re Game*, 66 L. J. Ch. 505."
- " 78, note (f), add "See also *Re Game*, *supra*."
- " 79, note (f), "Not followed in *Re Game*, *supra*."
- " 80, note (c), "*Harris v. Poyner*, followed in *Re Game*, 66 L. J. Ch. 505."
- " 80, note (y), "*Craig v. Wheeler*, followed in *Re Game*, *supra*."
- " 81, note (c), "*Harris v. Poyner*, followed in *Re Game*, *supra*."
- " 81, note (d), "See *Re Carter*, 41 W. R. 140."
- " 82, note (a), add "*Re Hubbuck*, (1896) 1 Ch. 754."
- " 82, note (c), "*Re Pitcairn*, (1896) 2 Ch. 199."
- " 83, "In *Re Game*, 66 L. J. Ch. 505, G. devised freehold and leasehold for life with remainder over. It was held that neither the use of the word 'rents,' nor a power of distress given to annuitants, nor both these circumstances, amounted to an indication that the leaseholds were to be enjoyed in specie."
- " 83, note (a), "*Vuchell v. Roberts*, not followed in *Re Game*, *supra*."
- " 84, note (a), "*Harris v. Poyner*, followed in *Re Game*, *supra*; *Wearing v. W.*, not followed."
- " 85, note (a), "Followed in *Re Game*, *supra*."
- " 86, note (c), add "*Re Pitcairn*, *supra*."
- " 86, note (f), substitute for "*Re Hubbuck, &c.*," "*Re Hubbuck*, (1896) 1 Ch. 754."
- " 87, line 22, add "See further as to leaseholds, *Brextton v. Day* (1895, 1 Ir. R. 518; *Blake v. O'Reilly*, ib. 479. As to liability of tenant for life for repairs of leasehold house, see *Kingham v. K.* (1897), 1 Ir. R. 170; *Re Rüdling*, 45 W. R. 457."
- " 88, note (c), substitute "*Re Hubbuck*, (1896) 1 Ch. 754."
- " 88, note (f), add "*Re Hill's Sett. Trusts*, 75 L. T. R. 477."
- " 89, note (b), add "*Bulkeley v. Stephens*, (1896) 2 Ch. 241."
- " 90, note (c), "*Mara v. Browne* was reversed on the evidence, (1896, 1 Ch. 199."
- " 106, line 27, add "So contracts of a personal nature, e.g. as between author and publisher, cannot be assigned without consent, whether the agreement is between an author and an individual or a company: *Griffith v. Tower, &c. Co.*, (1897) 1 Ch. 21."
- " 106, note (c), alter reference to *Ex p. Nicholls* to "22 C. D. 782," and add "*Wilnot v. Alton*, (1897) 1 Q. B. 17."
- " 109, note (d), substitute for "*Re Nicholls*" "*Ex p. Nicholls, Re Jones*"; add "*Wilnot v. Alton*, (1897) 1 Q. B. 17."

- Page 110, note (g), substitute for "*Re Nicholls*" "*Ex p. Nicholls, Re Jones*," and add "*Wilmot v. Alton*, (1897) 1 Q. B. 17."
- .. 114, note (d), add "*Wilmot v. Alton*, (1897) 1 Q. B. 17."
- .. 128, "In *Wilmot v. Alton*, (1897) 1 Q. B. 17, future payments to become due under a contract were assigned. Before the money became payable the assignor became bankrupt. Held, the trustee was entitled, following *Ex p. Nicholls, Re Jones*, 22 C. D. 782."
- .. 128, note (a), add "As to the equitable assignment of future payments, due under an executory contract, see *Re Ex p. Nicholls* and *Wilmot v. Alton*, supra, p. 106."
- .. 131, note (g), substitute for "*Re Nicholls, &c.*," "*Ex p. Nicholls, Re Jones*, 22 C. D. 782, followed *Wilmot v. Alton*, (1897) 1 Q. B. 17."
- .. 131, note (f), add "*Wilmot v. Alton*, (1897) 1 Q. B. 17."
- .. 141, note (a), add "*King v. Victoria Insurance Co.*, (1896) A. C. 250."
- .. 142, note (f), add "As to sequestration of the profits of the benefice of a bankrupt clergyman, see *Re Lawrence*, (1896) P. 244."
- .. 142, note (k), add "*Re Ward*, (1897) 1 Q. B. 266, 'retired pay' under Art. 1057 of Royal Warrant of 1887 is within sub-a. 2, and not within sub-a. 1 of s. 53, and so a portion may be appropriated for creditors."
- .. 144, *Alimony*, add "Sums of money ordered to be paid for maintenance of a divorced wife can neither be assigned nor released: *Watkins v. W.*, (1896) P. 222."
- .. 144, note (h), add "As to the sequestration of the profits of the benefice of a bankrupt clergyman, see *Re Lawrence*, (1896) P. 244."
- .. 144, note (k), add "*Re Ward*, (1897) 1 Q. B. 266."
- .. 145, *Champerty*, "See also *Rees De Bernardy*, (1896) 2 Ch. 437."
- .. 163, note (a), add "In the case of *Davies v. D.*, the confirmation was by an act after the disability of coverture had ceased. But where the assignment has been made while the assignor was under the disability of infancy, and not of marriage, it has been frequently held, that as a voidable deed it may be confirmed during marriage: see *Burrow v. D.*, 4 K. & J. 409; *Wilder v. Piggott*, 22 C. D. 363; *Re Hodyson*, (1894) 2 Ch. 426. In *Greenhill v. The North British Railway Co.*, (1893) 3 Ch. 494, the Judge apparently treated these cases as applicable where the assignment had been made after marriage, but this case appears to have turned on special circumstances. In other cases when the assignment was void, as being by a woman under the disability of marriage and not merely voidable, it has been held that it could not be confirmed: see *Scuton v. S.*, 13 App. Cas. 61, and *Harle v. Johnson*, (1895) 2 Ch. 422, in which the cases of confirmation are discussed by North, J., and the cases of assignments during infancy and coverture distinguished. In the same case he also distinguishes these cases of confirmation from those of election proper, where the married woman has to elect between two funds. As to these, see the notes to *Streatfield v. S.*, p. 416, post." Delete "And see Addenda, note (a)."
- .. 165, note (c), "*Miller v. Collins*, (1896) 1 Ch. 573, overruling *Re Newton's Trusts*." Delete "Addenda, note (b)."
- .. 168, note (a), add "See supra, pp. 164 and 165, and *Miller v. Collins*, (1896) 1 Ch. 573, overruling *Re Newton*."
- .. 203, note (g), add "*Re Cook's Mortgage*, (1896) 1 Ch. 923."
- .. 221, note (a), add "For form of judgment where infant plaintiffs are entitled to one undivided third, declaring infants in event of sale to be trustees for purchaser, and directing conveyance by next friend, see *Davis v. Ingram*, (1897) 1 Ch. 477."
- .. 244, note (a), "See *Priestley v. Ellis*, (1897) 1 Ch. 489."

- Page 351, note (c), add "But see *Re Goodall*, 44 W. R. 70, 65 L. J. Ch. 63."
- .. 353, *Option to purchase*. "See also *Re Goodall*, 65 L. J. Ch. 63."
- .. 389, "W., seized of an estate in fee, devised it to her executors on trust for sale, and to pay debts, &c., no gift of residue. W. had no heir. Balance of proceeds of sale escheated to Crown. *Re Wood, A.-G. v. Anderson*, (1896) 2 Ch. 596."
- .. 389, "As to a resulting trust in the case of a friendly society where the objects for which subscription had been made did not exhaust the fund, see *Cunnack v. Williams*, (1895) 1 Ch. 489."
- .. 389, note (d), add "As to sect. 4 of the Act, see *Re Wood*, (1896) 2 Ch. 596."
- .. 389, note (e), after "*Re Lashmar*," add "*Re Wood, supra*."
- .. 407, line 17, "But delivery, which is essential, may be antecedent to the gift. *Cuin v. Moon*, (1896) 2 Q. B. 283; cf. *Thompson v. Heffernew*, 4 Dr. & Wn. 485."
- .. 409, note (b), "*Cuin v. Moon*, (1896) 2 Q. B. 283, delivery may be antecedent to the gift."
- .. 411, note (b), refer to "*Cuin v. Moon*, (1896) 2 Q. B. 283."
- .. 422, note (a), add "*Minchin v. Gabbett* (1896), 1 Ir. R. 1, where *Raneliffe v. Parkyns* is discussed."
- .. 425, note (a), after "*Raneliffe v. Parkyns*," add "discussed in *Minchin v. Gabbett* (1896), 1 Ir. R. 1."
- .. 426, note (c), after "*Raneliffe v. Parkyns*," add "discussed in *Minchin v. Gabbett* (1896), 1 Ir. R. 1."
- .. 427, note (f), add "discussed in *Minchin v. Gabbett* (1896), 1 Ir. R. 1."
- .. 443, note (c), add "See *Re Jones*, (1893) 2 Ch. p. 469."
- .. 443, note (g), add "*Re Jones*, (1893) 2 Ch. 461."
- .. 450, line 12, add "See *Bloomenthal v. Ford*, (1897) A. C. 156, in which the H. L., overruling the C. A., held that a company having obtained a loan by a misrepresentation that the shares were fully paid, were estopped as against the lender from alleging that they were not fully paid, and the liquidation was also held estopped."
- .. 450, note (b), after "*Jordan v. Money*," add "followed in *Chadwick v. Manning*, (1896) A. C. 232."
- .. 452, notes (a) and (b), add "And see judgments in *Bloomenthal v. Ford*, (1897) A. C., pp. 160—172." Refer in margin to *Bateman v. Faber*, W. N. (97) 66.
- .. 452, note (d), add after "*Jordan v. Money*," "followed in *Chadwick v. Manning*, (1896) A. C. 231."
- .. 453, note (a), add "As to a case in which silence was held not to be a legal wrong and so not to work an estoppel, see *Ogilvie v. W. Australian, &c. Corp.*, (1896) A. C. 257."
- .. 453, note (a), "*Peck v. Gurney* is distinguished in *Andrews v. Mockford*, (1896) 1 Q. B. 372."
- .. 453, note (f), add after "7 V. 251," "6 R. R. 119."
- .. 454, note (c), add "*Aaron's Reefs v. Twiss*, (1896) A. C. 273. Cf. *Lynde v. Anglo-Italian, &c. Co.*, (1896) 1 Ch. 178."
- .. 454, note (b), add "*Andrews v. Mockford*, (1896) 1 Q. B. 372; *Reid v. Hooley*, 13 Times L. R. 398."
- .. 461, note (b), add "See *Dunn v. Spurrier*, 6 R. R. 119."
- .. 462, note (b), add "followed in *Chadwick v. Manning*, (1896) A. C. 231."
- .. 465, note (g), add "And see same case, (1896) A. C., p. 336."
- .. 467, note (a), "But see *Bloomenthal v. Ford*, (1897) A. C. 156. And as to estoppel from denial of authority to apply for shares, see *Re Consort Deep Level, &c.*, W. N. (97) 25."
- .. 467, note (a), add "*Bloomenthal v. Ford*, (1897) A. C. 156."
- .. 467, note (c), add "As to estoppel by debenture stock certificate, see *Robinson v. Montgomeryshire, &c. Co.*, (1896) 2 Ch. 811."

- Page 467, note (d), *add* "*Roberts v. Security Co.*, 13 Times L. R. 79."
- 467, note (e), *add* "See *Bloomenthal v. Ford*, (1897) A. C. 156, and see further as to paid up shares, *Re Concession's Trusts*, (1896) 2 Ch. 757, where *Bishop v. Balkis, &c.*, 25 Q. B. D. 512, is observed upon."
- 521, line 17, *add* "See as to the allowance for maintenance and establishment which should be made to the mother, sole guardian of an infant heir: *Barnes v. Ross*, (1896) A. C. 625."
- 558, note (d), *add* "See an article in Law Quarterly Review, Jan. 1896, by Mr. T. Cyprian Williams."
- 558, line 23, *for* "*Loyl v. L.*," *read* "*Lloyd v. L.*"
- 605, *Gaudy v. G.* is explained in *Bishop v. B.*, 45 W. R. 568.
- 601, note (d), *add* "*Re Howard*, 13 R. 233, following *Re Briant, supra.*"
- 603, note (b), *add* "*Re Howard*, 13 R. 233, following *Re Briant, supra.*"
- 603, note (g), *add* "*Re Howard*, 13 R. 233."
- 641, note (f), *add* "*Re Howard*, 13 R. 233, following *Re Briant, supra.*"
- 641, note (g), *add* "Cf. *Re Howard*, 13 R. 233, following *Re Briant*, 39 C. D. 471."
- 672, note (g), *add* "*Re Hmeurt*, 13 R. 233, following *Re Briant, supra.*"
- 671, note (d), *add* "*Re Grey's Sett.*, 34 C. D. 112; *Re Tippet, &c.*, 37 C. D. 444; and *Re Fearon*, 45 W. R. 232, in which case *Re Brown*, *supra*, was followed."
- 671, section 5 of M. W. P. Act, 1882, *add* "*Re Williams*, 102 L. T. Jo. 439."
- 689, note (h), *add* "*Hood-Barrs v. Heriot*, (1897) A. C. 177."
- 689, note (f), *add* "*Hood-Barrs v. Heriot, supra.*"
- 691, line 22, *add* "*Stanley v. S.*, 16 Eq. 29; *Cuhill v. C.*, 8 App. Cas. 420; Trustee Act, 1893, s. 45 (1), printed vol. 2, p. 691."
- 711, note (a), "*Re Bora*, followed *Re Fearon*, 45 W. R. 232."
- 713, note (c), *add* "*Harrison v. H.*, 13 P. D. 180, 184, 186."
- 716, section 19 of M. W. P. Act, 1882, *add* "*Re Williams*, 102 L. T. Jo. 439."
- 723, line 8, *add* "But her separate estate restrained cannot be bound by estoppel: *Bateman v. Faber*, W. N. (97) 66."
- 724, note (a), Cf. *Thompson v. T.*, (1896) P. p. 271.
- 741, "*Powers of the High Court.* The English Courts have no jurisdiction to restrain English subjects from committing a tort in a foreign country: '*Morocco Bound*,' &c. v. *Harris*, (1895) 1 Ch. 334."
- 823, In the 7th line *delete* the word "not," and *add* in 8th line "of an annuity charged by the will in priority to the trusts."
- 829, note (c), *add* "but see *Ravencroft v. Jones*, 4 De G. J. & S. 223."
- 845, note (h), *add* "*Parker v. Hudson*, 39 L. J. Ch. 590; and compare *Evans v. Scott*, 1 H. L. C. 57, and *Taylor v. Lambert*, 2 C. D. 181."
- 869, note (g), *add* "See for the rules applicable when the presumption against double portions applies: *Ex parte Pye*, vol. 2, p. 366."

ADMINISTRATION.

DUKE OF ANCASTER *v.* MAYER.

1783, 1784, 1785. 1 Bro. Ch. 454.

Primary Liability of Personal Estate to the Payment of Debts.— Exoneration.

Personal estate, not specifically bequeathed, is primarily liable to the payment of the debts of a testator, unless it be exempted by express words or necessary implication.

Notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by the testator subject to a mortgage shall bear the burden of that mortgage, it not being properly the debt of the testator.

CHARLES BERTIE made his will, dated the 9th of November, 1759, and thereby devised as follows: "I give and devise to Thomas Noel and John Mayer, their executors, administrators, and assigns, all those my manors, lands, &c., in Lincolnshire, to have and to hold to them, from the time of my decease, *for the term of ninety-nine years*, upon the trusts hereinafter mentioned." He then gave the real estate, subject to the term, and in default of issue of his own body, to Montague Bertie for life, remainder to his first and other sons in tail male, remainder to the plaintiff for life, remainder to his first and other sons in tail male, with remainders over, and afterwards declared as follows: "*I do hereby declare, that the term and estate so as aforesaid limited to them the said Thomas Noel and John Mayer, their executors, administrators, and assigns, for ninety-nine years, is upon the special trust and confidence, and to the intents and purposes following, that is to say, Upon trust and confidence that they the said Thomas Noel and John Mayer, then executors &c., shall out of the rents and profits, or by mortgage, assignment, or demise of all or any part of my before-mentioned manors, &c., or any of them, for all or any part of the said term of ninety-nine years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient to pay and satisfy all*

Ancaster v. Mayer.

the debts I shall owe at the time of my decease, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that after so much money shall be raised as shall answer the purposes aforesaid, together with all costs and charges in or about levying or raising thereof, the said term shall cease and determine."

He then devised as follows: "*I give and devise to my brother, Montague Bertie, his executors and administrators, all that the manor of East and West Deeping, holden by lease from the Crown, subject to the yearly rents and covenants reserved in the said lease, and also subject to the mortgage therein to Mrs. Millicent Nute, of London, for 6500*l.*; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations in this my will."*

And towards the end of his will he devised as follows: "Item, I also give all my household goods, and all other my goods, chattels, and effects, and personal estate whatsoever and wheresoever, unto my said brother, Montague Bertie, if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will: provided always, and I do hereby declare my mind and will to be, that in case I shall at the time of my death leave issue of my own body, that then and in such case as well all and every the before mentioned uses, devises, and limitations to my said brother, Montague Bertie, the Duke of Ancaster, and their respective heirs, and also the devise of the residue of my personal estate, shall be utterly void; and in such case I do hereby will, and my mind is, that all my real estate, subject to the said term of ninety-nine years, shall descend according to the rules of law, and that the residue of my personal estate shall go and be distributed in such manner, and to and among such persons, as if I had died intestate. And I do hereby nominate and appoint the said Thomas Noel and John Mayer executors of this my last will; and I do hereby will, order, direct, and appoint, that my said executors and the survivor of them shall and do pay, satisfy, and discharge my funeral charges, and all my debts and legacies as soon as they shall

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become due and payable, by such methods, ways, and means, and in such manner as he or they, or their counsel learned in the law, shall in that behalf advise and think meet; and it shall and may be lawful to my said executors, or either of them, to do and satisfy to him or themselves, out of my personal estate, or out of the moneys to be raised out of the said term of ninety-nine years before to them devised, all such disbursements, expenses, and charges which they or either of them shall be put to in proving this my will, or by any other ways or means whatsoever in or about the execution of this my will."

Montague Bertie died in the lifetime of the testator, and the plaintiff became entitled, under the limitations in the will to the real estate.

The leasehold estate had been, several years before, mortgaged by the testator's father for 6500*l.* to Mrs. Neate, and in 1765 the mortgage was assigned, by the desire of the testator, to Sir Thomas Palmer, who advanced the testator a further sum of 100*l.* on it, and the testator conveyed other estates as an additional security for the 6600*l.*

This cause was first heard before the late Lords Commissioners.

Mr. Mansfield, Mr. Madocks, and Mr. Kenyon, for the plaintiffs.—There are three questions in this case: first whether the personal estate is exonerated of the debts (*a*); secondly, whether the mortgaged estate is liable to the mortgage (*b*); thirdly, what interest the duke takes in the personal estate.

Mr. Selwyn, Mr. Arden, and Mr. Ainge, for the defendants.—As to the last question, we contend the duke can take a limited interest for life only, there being no addition of executors or administrators in the will. Secondly, with respect to the second, that the mortgaged premises must bear their own burthen.

As to the first point, which is the principal question, it depends on the several clauses in the will (*c*).

(*a*) *Wainwright v. Bendelowe*, 2 Vern. 718; *Anderton v. Cooke*, 1 Bro. Ch. 456; *Stapleton v. Colville*, Cus. t. Talbot, 202; *Kynaston v. K.*, 1 Bro. Ch. 457; *Holiday v. Bowman*, 1 Bro. Ch. 145; *Banfield v. Wyndham*, Pr. Ch. 101; as to which three last cases see *infra*, p. 16, n. (*c*).

(*b*) *Sirle v. St. John*, 2 W. 386; *Galton v. Hancock*, 2 Vt. c.

(*c*) *Brouhall v. Willes*, at the Rolls, November, 1750; *Inchiquin v. French*, 1 Cox, 1; *Percival v. Robinson*, 1 Bro. 301; *Stephenson v. Heathcote*, 1 Eden, 58.

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Lords Commissioners ASHURST and HOTHAM held: (1) that the plaintiff was entitled to the personal estate exempt from payment of debts; (2) that the mortgage must be paid out of the devised estate; (3) that the plaintiff took an absolute interest in the personalty.

A petition was presented for a rehearing, which came on before Lord *Thurlow*, the 16th of June, 1784. The arguments used, and the cases cited, were a recapitulation of those before the Lords Commissioners.

LORD CHANCELLOR THURLOW.—It would be highly advantageous to property if there was a settled rule where the personalty shall be applied to the payment of debts, and where it shall be exempted from them. One step has been taken towards such a rule, by its being laid down, that charging the estate in any way is not of itself an exemption of the personal estate; that the personal estate being the fund first liable, where it is to be aided by either a legal or an equitable fund, it must be itself in the first place applied.

The question that next arises is, whether, a real estate being charged, and the personal given away, a presumption arises that this shall be exempted from the debts. I never heard, till the arguments in this case, that such a rule had been extracted from the authorities on the subject; on the contrary, I have always understood that, in order to exempt the personal estate, the testator must express an intention so to do, although no particular form of words was necessary for the purpose. *I therefore take the rule in primis to be, that neither the charge of the debts upon the real estate, nor the gift of the personal estate, is sufficient of itself to exempt it. But it is indubitably true, that express words are not necessary to exempt the personal estate: the question therefore is whether a presumption can be drawn of the testator's intention to exonerate the personal estate. It is impossible to express in definition what circumstances shall be sufficient to raise this presumption. It must arise from the context of the will; but with great deference to the opinion which has been given, I think there is not sufficient in this will.*

After devising his real estate, the testator takes up the term; he places it before any of his other estates, and before his issue, so that he meant it to be a subsisting term for the payment of his debts.

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He gives his leasehold estate to Montague Bertie, but without any predilection; for he gives it to whoever should be entitled to the possession of his freehold estate. He then proceeds to declare the trusts of the term which are to raise money to pay his debts and legacies; and after raising them, the term is to cease. He then disposes of the rest of his personal estate. He afterwards determines what shall be done with the personal estate in case he should have issue. In the provision which he superadds, he takes notice of the devise of the personalty, and calls it a residue; by which he means the devise of the personal estate after the specific bequest. He provides then, that if he should die leaving issue, the dispositions he had made should fail: this was not essentially necessary, though apparently so. He then makes a general provision for the discharge of the executors, who are also trustees; so that it is given them in the character of executors. It is also material to observe, that, in the special and general disposition of the personal estate to the same person who shall be entitled to the possession of the real, the personal is made to accrue to the real, which is settled with the utmost strictness. The question, then, is whether any inference is to be drawn that he meant it should go with the burthen the law throws upon it, or whether it is to be presumed that it should be exonerated, for the purpose of throwing that burthen on the freehold estate, which he has given in the strictest manner. The inference rather seems to me to be, that he meant to protect the real estate, and therefore that the personal should bear its natural burthen. By chance he has gone further: for, where he has given directions for the indemnity of his executors, he has directed the expenses to be taken out of either the personal or real estate. He has, in that clause, arranged the estates as the law would arrange them, which affords an inference that he meant the real estate only to be in aid of the personal. I should therefore think, if the rule were, that the gift of the personal estate to a stranger was sufficient to raise a presumption that it was to be exempt from the debts, he had sufficiently here expressed his intention that it should not be so; but I take the general rule to be the other way.

I should have no doubt on the intention of the testator in this respect, if there were not another point, which I think ought to undergo further inquiry—I mean the mortgage of the leasehold

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estate. The case of *Scile v. St. Eloy* (a) went upon the idea of the charge upon the real estate being the debt of the testator. If that case were recent, and had not been followed, I should have thought, upon the face of it, it was very open to argument. The difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge; but, in the present case, the debt of the father falls upon the estate in two ways—partly as being a charge, and partly as a debt, upon the personal estate. It must be referred to the Master to consider the circumstances of the debt of 6000*l.*, and the estate on which it was secured; and, as that point must stand over, I shall think it no impediment to the justice of the Court to defer the decree upon the other point also.

The Master having made his report that the 6000*l.* was a charge upon the leasehold estate prior to the testator's having any interest in it, and that he had only covenanted for the payment of the money upon the transfer of the mortgage from Mrs. Neate to Sir Thomas Palmer (b), the cause was again set down for argument on the 4th July, 1785, and then stood for judgment till the next day, when the Lord Chancellor pronounced his decree.

LORD CHANCELLOR THURLOW.—Whether the personal estate should be liable, in the first instance, in exoneration of the real estate, to the payment of debts in wills of this kind, upon looking into the cases I find to be a point so slender and fine that I cannot collect any certainty upon the question; but so much uncertainty abounds, that, could the will of the testator be referred to a number of lawyers, they would probably entertain a diversity of opinions upon it.

The point ought to be fixed; and, in order to make it so, I take it, the rules have been these, and should be adhered to. In the first place, that *the personal estate is liable in the first instance to the payment of the debts*; but (in exception to this) it is agreed that the testator may, if he pleases, give his personal estate, as against his heir or any other representative, clear of the payment of his debts;

(a) 2 P. W. 386.

seems, advanced to the testator. Vido

(b) A further sum of 100*l.* was, it ante, p. 3.

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and then it becomes a question, what is the mode of expression to give the personal estate exempt from such payment, when the rule of law is, that such estate is first liable. Perhaps it might have been not unwise to have adopted the rule laid down in *Ferreges v. Robinson* (a)—that the testator must use *express words* for that purpose; but it is impossible to abide by the opinion given in that case, consistently with the rules in other cases. The second rule is, *that where there is a declaration plain; that shall stand in lieu of express words*. This rule has been laid down so long and acted upon so constantly, that if other judges were to put the construction of wills upon other grounds, how wise soever it might have been originally to have done so, it would be very unwise to make the administration of justice take a course contrary to former rules. Therefore *if there be a declaration plain, or notwithstanding clear, so that it is apparent, upon the face of the will, that there is such a plain intention, the rule then is, not to disappoint, but to carry such intent into execution*. But should not such intention manifestly appear, there is not a single case which does not take it for granted that the personal estate is, by law, the first fund for the payment of debts.

In regard, then, to the general intention of the will of Charles Bertie, the testator was seised of a real estate, which he had in his contemplation (exclusive of the idea of his own children), and wished to leave it to other lines of the family of Bertie, and consequently devised it to Montague Bertie, with remainder over to Peregrine Bertie for life, &c. : so far, in respect of the real estate his intention was to fix it in the name and blood of the family.

The next object he had in view was a leasehold estate, which he held under the Crown : that estate was a chattel interest, and with regard to that, he does not show such a wish to fix and continue that estate in the line of Bertie. His apparent wish was not so strong as in respect to the disposal of his real estate; for had it been so though he could not have created an entail of this leasehold estate with limitations over, yet he might have prevented the first taker of it from alienating it. Had the testator been asked the question, whether he meant that this part of his estate should be subject to the mortgage, or to give it entire to the first taker of the real estate, or to charge the term of ninety-nine years in exoneration of the other

(a) Bunb. 301.

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estate, this might have been a very doubtful question, and merely conjectural, though, perhaps, he might have answered, that that estate should pay the debts; but whatever his intention was, *he has positively given it subject to the payment of the debt*; therefore, if another estate had been appropriated to payment of his debts, and this had been *his* debt upon the estate, I should have concurred with the Lords Commissioners (a); but in following them in that course, in which they considered it as being the clear intention in the mind of the testator, that the real estate should be so appropriated, I rather think otherwise; for it appears to me as if the testator wished it should not, and that he chose that the leasehold estate should be so appropriated rather than to have burdened the real estate. For the mode of limiting the estate to Montague Bertie for life implies the intention of giving him a personal bounty; but, in case of failure of issue, he gives it to the next heir who should come into possession, &c. Had the real estate been expressly charged with payment of the debts, or the testator shown an anxious intention to have sacrificed his real estate in preference to the leasehold or his other estate, for that purpose, by the mode of disposing of his estates, such a circumstance might have been sufficient to have turned the rule of law; and it must have been appropriated to the payment of debts, let him have charged it any manner he pleased.

When the testator purchased this leasehold estate he purchased the equity of redemption; and the mortgage was to be considered merely as a real incumbrance upon the estate itself, and not a personal debt, as against the purchaser, according to the rules of this Court and cases decided. For *if a man purchases an equity of redemption, subject to an incumbrance that shall be a real incumbrance following the land, and not a personal one*. The question is, whether by purchasing this estate, and assigning the mortgage from Mrs. Neate to Hoare, and covenanting for payment of debts, he did not make it his own debt. Had *Evelyn v. E.* (b) never been decided, a fair argument might have arisen upon that head; because, where a man transfers a mortgage, and covenants for the payment of the debt according to the rule of law, he makes it his own debt, and makes himself liable to be sued upon that covenant; and

(a) See *Bootle v. Blundell*, 1 Mer. C. 763.
227; *Bickham v. Cruttwell*, 1 My. & (b) 2 P. W. 659.

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such a debt has priority before other simple contract debts. Now, I do not know in what Court, or by what rule, the debt would have followed the purchaser personally; but *Evelyn v. E. (b)* has decided, that though he might be at law liable, yet where there are real assets sufficient for the payment of the incumbrance, they shall be applied for that purpose; and it is to be understood with respect to such transaction, that the party did it by way of accommodating the charge, and not of making the debt his own. The difference between the estate descended and purchased is nothing, unless the circumstance of purchasing creates the difference; but that affords no argument.

The next question is, whether, when he mortgages an estate of his own as an ulterior security, that circumstance would create a difference; as if, in *Evelyn v. E. (b)*, an additional real fund had been secured for making the debt good that would have turned the judgment: it would not; for nothing makes it his debt so effectually as the covenant to pay; for it does not create the debt, but only operates as collateral to the debt. A man mortgages his estate without covenant, yet, because the money was borrowed, the mortgagee becomes a simple contract creditor, and in that case the mortgage is a collateral security; and if there is a bond or a covenant, then there is a collateral security of a higher species, but no higher by means of the mortgage merely: therefore, having such security amounts to nothing; and I have no doubt but that if the case had been stated to the Lords Commissioners namely, that this incumbrance was not one of the testator's debts and did not fall upon the personal estate, that they would have considered it as inherent to the leasehold estate. The argument of its not falling upon the testator answers his real intention better. But as to the real intention, I should have agreed with the Lords Commissioners, could that intention have been made clear; that the intention does not amount to a declaration plain, in any sense in which these words have been properly applied.

For the purpose of securing property and the due administration of justice in a free country, judges ought to abide constantly by real principles, and by such beneficial rules as may afford some reasonable judgment, without applying to a superior tribunal. It is a fixed rule, that the personal estate must be first liable, unless another fund is

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provided, the testator must express his intention to discharge that estate from the payment of debts.

With regard to the intention apparent upon this will, it is said such intention is most anxiously limited to the raising of the term of ninety-nine years. Whether the expression be more or less, it is but subjecting the estate to the payment of debts; and it cannot extend so far as to suppose he burthened his real estate in exoneration of the personal estate. If there had been in the gift of the personal estate words of a sufficient force, according to my notion of a declaration plain, I should not have changed the force of those words, but the intent of those words, as they stand, naturally leans to subject the personal estate to the debts. With respect to the second clause, had that stood alone, I confess that would have been liable to a degree of inference, but constructions thus picked up, and collected from more circumstances than are necessary for the purpose, are not good ways of finding out the intention of the testator; and it is better to rest upon settled rules, unless you can collect more favourable and forcible observations. With regard to the next clause, that carries more weight, because the trustees are directed to pay, not only the expense of the probate of the will, which is expressly mentioned, but to pay all the charges and expenses that should arise by proving the will, or by any other means, &c. How are these to be paid? Out of the personal estate, or the means to be raised out of the term of ninety-nine years? They have authority to pay the whole out of the personal estate—an optional clause, an empowering the executors to pay out of this fund before the other fund is ready for the purpose. He has precisely arranged the estates in the same order that the law would have done; he has made his personal estate first liable, and then the term. The true ground upon which I proceed is not upon any of these criticisms, but simply upon the rule of law, the testator not having declared by express words, or any other declaration, which would tend in law to the purpose of preserving the personal estate for any given purpose whatsoever. As to *Adams v. Meyrick* (a), that depended on the circumstance of the personal estate being a provision for the wife; and, therefore, the Court forced a construction upon the will, and it is, as Lord *Hurdwicke* termed it, in *Walker v. Jackson* (b), a weak case: in the latter case, the republication

(a) 1 Eq. Ca. Abr. 271.

(b) 2 Atk. 624.

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of the will was an argument much relied upon. As to the caſes determined upon the words "reſt and reſidue," I could have wiſhed his Lordſhip had decided upon them all, ſo as to have left a particular note upon each of them; for ſuch determinations as theſe caſes afford have occaſioned great perplexity upon the rule of law. As to *Stapleton v. Colville (a)*, in that caſe the wife was executrix, and, excluſive of the context of the will, with regard to the option given to her to charge either fund, there never was a ſtronger caſe againſt charging the real eſtate; for he gives the whole real eſtate to the wife, and to be charged with debts, he wiſhes the continuance in his name and family, and yet charges it with the payment of the debts. Lord *Talbot* obſerved, much might ariſe from the examination as to the quantum of the debts and the amount of the perſonal eſtate. Lord *Talbot* took it as clear, that ſuch an examination ſhould be gone into. In *Stephenson v. Heathcote (b)*, it is ſaid expreſſly, no examination can be had. In that caſe Lord Keeper *Henley* relied much upon the wife being executrix. The caſe was this: that the teſtator gave all his real eſtate to R. and his wife for ever, with a charge thereon for payment of debts, and, after diſpoſing of other property, he gives a ſilver tobacco-box to his uncle, and all the reſidue he gives to his wife for ever, whom he appointed ſole executrix. The Lord Keeper's obſervation upon this caſe was, that the intent of the teſtator was to be collected from the words of the will, and from no circumſtances out of it, and, upon general principles and rules eſtabliſhed in the caſes, that the Court would not go into the teſtator's circumſtances, as it would eſtabliſh a rule not to be adhered to. The teſtator intended to charge his perſonal eſtate with payment of his debts, and only made his real eſtate an auxiliary fund: according to the rule of law, where the intent of the teſtator is plain, or words tantamount to expreſs words, that is ſufficient to take it out of the rule, and that it could not be the intention; for the laſt clauſe of giving the ſilver tobacco-box, and then the reſidue to his wife, is not ſufficient to ſhow his intention to give the reſidue free from debts, but that the primary fund ſhould be liable.

In the preſent caſe, I am obliged to differ from the Lords Commiſſioners, and conſider the whole perſonal eſtate as liable to the payment of the debts; and, with reſpect to the leaſehold eſtate, that

(a) *Cas. t. Talbot*, 202.(b) *1 Eden*, 38.

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the charge under which it came to the testator was prior to his purchasing it, and inherent in the estate, and the estate itself left liable to answer it, and that neither the personal estate nor real estate ought to be charged with that debt.

The judgment, *ex relatione*. //

NOTES.

1. Generally.
2. Cases illustrating the principle of exoneration.
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1. Generally.

The rule laid down in the principal case, viz., *that the general personal estate of a testator is the primary fund for the payment of his debts, unless it be exempted by express words or manifest intent*, has been fully recognised. But the difficulty of gathering the intent, where the exoneration of the personal estate does not depend upon express words, is very great. Certain circumstances may have more or less weight with the Judge deciding the question, but such circumstances may be explained or rebutted by other parts of the will. For the *intention* of the testator, which is the thing to be got at, is to be collected from the whole will (*a*). Parol evidence is not admissible (*b*), and the burden of proof lies on those who contend for exemption (*c*).

2. Cases illustrating the Principle of Exoneration.

Express Words. See cases (*d*).—It is not essential to the validity of a direction that a fund of personalty should be exempted from pay-

(*a*) Jarman, 1893, p. 1462; Coote, 1880, p. 951; Gittins v. Steele, 1 Swan, 24; Watson v. Brickwood, 9 V. 453; Kilford v. Blaney, 31 C. D. 56; Howe v. Dartmouth, *infra*, p. 74.

(*b*) Inchiquin v. French, 1 Cox, 1; Stephenson v. Heathcote, 1 Eden, 38.

(*c*) Whicklon v. Spode, 13 B. 539; Lord v. Wightwick, 1 Drew. 576; Kilford v. Blaney, 31 C. D. 56.

(*d*) Morrow v. Bush, 1 Cox, 185; Young v. Y., 26 B. 522; Dawes v. Scott, 5 Russ. 32; Forrest v. Prescott, 10 Eq. 545.

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ment of debts, that the fund should be specifically bequeathed, for it is equally good, though the fund not being disposed of falls into the residue (*a*). Where personalty is expressly exempted from payment of debts, and they are thrown upon a third fund which proves insufficient, they cannot come upon the personalty until every other fund, even real estate settled by the will of the testator, has been exhausted (*b*). When, however, land is simply given for payment of debts in exoneration of the personalty, if the land is insufficient for that purpose, the primary liability of the personalty remains for the purpose of making good the deficiency (*c*). If, moreover, the land and the residue are both given exempt from the payment of debts, on failure of the other funds, the residue is primarily liable (*d*).

Exemption by Plain Intention.—Such an intention is not shown merely by a charge upon land, or a trust to sell, or the creation of a term for payment of the debts (*e*); although the charge be by deed (*f*). Nor *semble*, by a devise of real estate, upon the condition of the devisee paying the testator's debts (*g*).

A gift of the real and personal estate together will not be sufficient (*h*). But if the realty is devised upon trust for sale, and the proceeds are blended with the personalty upon trust for payment of debts, the realty and personalty are liable rateably for that object (*i*).

So where a testator had empowered his trustees to sell his real and personal estate in case and as often as they should think fit, and had directed them to pay certain legacies out of the residue of his real and personal estate, and the moneys arising from the sale thereof,

- (*a*) *Coventry v. C.*, 2 Dr. & Sm. 470. 201; *Samwell v. Wake*, 1 Bro. Ch. 145; *Boote v. Blundell*, 1 Mer. 221.
 (*b*) *Morrow v. Bush*, 1 Cox, 185; *Young v. Y.*, 26 B. 522.
 (*c*) *Colville v. Middleton*, 3 B. 570.
 (*d*) *Brooke v. Warwick*, 1 H. & Tw. 112.
 (*e*) *Tower v. Rous*, 18 V. 132; *Brydges v. Phillips*, 6 V. 567; *White v. W.*, 2 V. 43; *Bridgeman v. Dove*, 3 Atk. 201; *Inchiquin v. French*, 1 Cox, 1; *Tait v. Northwick*, 4 V. 816; *Hancox v. Abbey*, 11 V. 186; *Rhodes v. Rudge*, 1 Si. 79; *Collis v. Robins*, 1 DeG. & Sm. 131; *Walker v. Hardwick*, 1 My. & K. 396; *Ousely v. Anstruther*, 10 B. 453; *Quennel v. Turner*, 13 B. 551; *Samwell v. Wake*, 1 Bro. Ch. 145; *Boote v. Blundell*, 1 Mer. 221.
 (*f*) *Trott v. Buchanan*, 28 C. D. 44.
 (*g*) *Bridgeman v. Dove*, 3 Atk. 201; *Meade v. Hyde*, 2 V. 120; *Henry v. H.*, 6 Ir. R. E. L. 286; *Ex p. French v. Chichester*, 2 Vern. 668.
 (*h*) *Boad v. B.*, 1 H. L. C. 403; *Tench v. Chase*, 3 DeG. M. & G. 473; *Roberts v. Walker*, 1 Russ. & M. 752; *Dock v. Pinner*, 2 Russ. & M. 557; *Foundrin v. Gowley*, 3 My. & K. 383; *Stocker v. Turner*, 1 B. 479; *Salt v. Chattaway*, 3 B. 576; *Bedford v. B.*, 35 B. 584; *Tatlock v. Jenkins*, Kay, 651; *Ashworth v. Munn*, 34 C. D. 391.

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it was held by the C. A. that the legacies were payable *pro rata* out of the real and personal estate (a). And the result is the same where real estate is directed to be converted, and to become part of the personal estate (b).

The rule, however, of rateable payment does not extend beyond the things which the testator has expressly directed to be paid out of the blended fund. Thus although, according to a well known rule, where there is a gift by a testator of the "*residue*" of his property, real and personal, and either prior or subsequently thereto, there is a gift of legacies, the legacies by implication and by force of the word "*residue*" are charged on the residuary real as well as the residuary personal estate (c), the primary liability of the personal estate will not be thereby disturbed, the real estate being only thereby charged with the legacies in aid of the personalty (d).

But the rule of rateable payment will apply where a payment is directed to be made out of the rents and profits of an aliquot *share* of real and personal estate (e); for as there are no burdens regularly incident to a *share* of personalty, there is no *prima facie* liability to be negatived, and the devisees take subject to the burthen imposed by the will, irrespective of any legal presumption: Jarm. (1893), p. 1439.

And where real and personal estate was given to trustees, upon trust to receive the rents, issues and profits thereof, and to pay certain legacies and annuities and to invest and accumulate the surplus of the whole of the property in trust for the same persons, the income arising from the personal estate was held to remain primarily liable (f).

But where the surplus is not given to the same persons, and it appears that the testator, from the large payments directed to be made out of the income of the real and personal estates, did not anticipate a surplus therefrom, and the real estate is given subject to the payments, the real and personal estates will be liable rateably (g).

(a) *Allan v. Gott*, 7 Ch. 439; *Re* 630; *Wells v. Row*, 48 L. J. Ch. 476; *Boards*, *infra*. *Re* *Boards*, (1895) 1 Ch. 499.

(b) *Bright v. Larchner*, 3 De G. & J. 148; *Simmons v. Rose*, 6 De G. M. & G. 411.

(c) *Falkner v. Grace*, 9 Ha. 282.

(e) *Greville v. Browne*, 7 H. L. Cas. 689; *Re Bailey*, 12 C. D. 268, 274.

(f) *Boughton v. B.*, 1 H. L. Cas. 406; *Tench v. Cheese*, 6 De G. M. & G. 453.

(d) *Elliott v. Dearsley*, 16 C. D. 322; *Luckcraft v. Pridham*, 48 L. J. Ch.

(g) *Howard v. Dryland*, 38 L. T., N. S. 24.

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Charging Funeral and Testamentary Expenses, &c., on Land. A mere charge of funeral or testamentary expenses, or of both in addition to debts upon real estate, although a strong circumstance (*a*), will not exempt the personalty, unless there are other words in the will which exhibit beyond reasonable doubt the intention of the testator to exonerate it (*b*). But where a testator *throws upon his real estate all those burthens which naturally fall upon the personal estate* as a primary fund, such as funeral and testamentary expenses, debts, and legacies a strong, though not absolutely conclusive, argument arises, that the testator intended to give his personalty as a *specific legacy*, free from those charges, and that, consequently, the realty is the primary fund for their payment (*c*).

Personal Estate bequeathed Specifically, not as a Residue.—The distinction between a mere residuary bequest, and a gift of *all* the personal estate, has been considered important (*d*). And where the personalty has been bequeathed, not as a residue, but as a whole, and *the debts and funeral and testamentary expenses* have been charged upon the real estate, the real estate has been held the primary fund for their payment (*e*). The same principle applies to *legacies*, where the funeral and testamentary charges and also legacies are in the same way thrown upon the real estate, for then it will be the primary fund for their payment (*f*).

So where the personal estate has been specifically bequeathed, and the debts, general and testamentary expenses, have been thrown upon a particular real estate, devised upon trust for their payment, such particular estate will be the primary fund for their payment; but if such particular estate is insufficient, and if

(*a*) *Burton v. Knowlton*, 3 V. 107.

(*b*) *Kilford v. Blaney*, 31 C. D. 56; *Brydges v. Phillips*, 6 V. 570; *Stephenson v. Heathcote*, 1 Eden, 38; *Aldridge v. Wallscourt*, 1 Ball & B. 312; *Tait v. Northwick*, 4 V. 816; *Gray v. Minnethorpe*, 3 V. 103; *Hartley v. Hurle*, 5 V. 540; *Rhodes v. Rudge*, 1 Si. 79; *McClelland v. Shaw*, 2 Sch. & L. 538; *Coote v. C.*, 3 Jo. & Lat. 179; *Bootle v. Blundell*, 1 Mer. 228.

(*c*) *Tower v. Rous*, 18 V. 138; *Bootle v. Blundell*, 1 Mer. 228; *Plenty*

v. West, 16 B. 179.

(*d*) *Tower v. Rous*, 18 V. 138; *Bootle v. Blundell*, 1 Mer. 228.

(*e*) *Greene v. G.*, 4 Madd. 148; *Michell v. M.*, 5 Madd. 69; *Driver v. Ferrand*, 1 Russ. & M. 681; *Blount v. Hipkins*, 7 Si. 43; *Kilford v. Blaney*, 31 C. D. 56; *Plenty v. West*, 16 B. 173; *Newbegin v. Bell*, 23 B. 386.

(*f*) *Jones v. Bruce*, 11 Si. 221; *Coote v. C.*, 3 Jo. & Lat. 175; *Aglionby*, 27 B. 61; *Gilbertson v. G.*, 34 B. 554; *Robertson v. Broadbent*, 8 App. Cas. 812.

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other real estate has been specifically bequeathed, not charged with debts, such real estate and the personal estate must contribute rateably towards the payment of the debts (*a*). The principle does not apply where a testator subjects his personal as well as his real estate to the payment of his debts, funeral and testamentary expenses (*b*).

A bequest of *all* the personal estate (with or without an enumeration of particulars), as distinguished from a mere general residuary bequest, will not, at any rate *where the legatee is also appointed executor*, exonerate the personalty passing under such bequest, although lands are devised in trust to pay all the testator's debts (*c*).

The inference against the exoneration of the personal estate, when the legatee is also the executor, arises upon the assumption that he takes the personal estate in that character, with all the burthens attached to it, in a regular course of administration. But it has also been decided that the personalty will not in similar cases be exonerated where the legatee is *not* executor (*d*).

And when it is a matter of doubt, whether the whole personal estate is meant to be given specifically or only as a residue, the omission to charge the funeral and testamentary expenses on the real estate, as well as the debts, is an argument which may be relied upon against the exemption of the personalty from its primary liability (*e*).

Personal Estate expressly Charged.—An express charge of some particular debts, as simple contract debts, or legacies on the personalty for the payment of which, without such charge, it would be primarily liable, will not, according to the maxim "*expressio unius est exclusio alterius*," raise a presumption that it is only to be the auxiliary fund for payment of other charges not expressly charged

(*a*) *Powell v. Riley*, 12 Eq. 175; *Bowman*, 1 Bro. Ch. 145; *Bamfield v. Wyndham*, Pr. Ch. 101; cited in the principal case, may be considered as overruled.

(*b*) *Patterson v. Scott*, 1 De G. M. & G. 531.

(*c*) *French v. Chichester*, 2 Vern. 568; *Harewood v. Child*, Cas. t. Talbot, 201; *Haslewood v. Pope*, 3 P. W. 324; *Brummel v. Protheroe*, 3 V. 111; *Trott v. Buchanan*, 28 C. D. 446; *Aldridge v. Wallcourt*, 1 Ball & B. 312. The cases, therefore, of *Kynaston v. K.*, 1 Bro. Ch. 457; *Holiday v.*

(*d*) *Collis v. Robins*, 1 De G. & Sm. 131; *Ouseley v. Austruther*, 10 B. 453; cf. *Greene v. G.*, 4 Madd. 148; *Kilford v. Blaney*, 31 C. D. 56.

(*e*) *Collis v. Robins*, *supra*; *Ouseley v. Austruther*, *supra*; *Tower v. Rous*, 18 V. 138; *Beotle v. Blundell*, 1 Mer. 193; *Robertson v. Broadbent*, 8 App. Cas. 812.

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upon it, but which are charged upon the land. In *Watson v. Brickwood* (a) a testator devised his real estate to a trustee upon trust for his nephews, W. W. and R. B., for life with remainders over. He then gave legacies to several nieces in blank, payable at the end of a year after his death, by his executor, and bequeathed all and singular his goods, chattels, personal estate, and effects whatsoever and wheresoever, not thereinbefore disposed of unto his said nephew W. W., his executors, administrators, and assigns, he paying thereout all and singular legacies, and all his funeral expenses and simple contract debts. The testator, then noticing that he was indebted, by mortgages and bonds, for money borrowed to pay for some of the estates he had purchased, directed that those debts should be paid by the devisees in equal proportions: and, after giving an annuity to a servant out of the real estate, he appointed his nephew, W. W., his executor. The will, it must be observed, does not charge the real estate with any debts; but the testator, by a codicil, appointed a trustee in the place of the one named in the will, and empowered the new trustee, "in order to raise money for the payment of all and singular his debts and legacies, to mortgage, with the approbation of the taker for the time being of his estates, a competent part of his said freehold estates, for so much money as should be necessary for that purpose; and he directed his trustees for the time being to keep down the interest:" and by another codicil he appointed another trustee, and gave other legacies. It was contended, that the personal estate was exonerated from the debts and legacies, or, at any rate, was liable only to the simple contract debts. *Grout, M. R.*, admitted that there was some indication of an intention to exonerate the personal estate, but thought that it was not so conclusive as to come up to the requisition of the rule laid down in the principal case, that is, a plain intention (b). By directing that the executor, to whom he gave all his personal estate, should pay thereout all the legacies, funeral expenses, and simple contract debts, *prima facie* there was some appearance of an intention that he did not mean the personal estate to be liable to debts by specialty. But that alone, upon the authorities, was not sufficient. In *Boottle v. Blundell* (c), *Eldon, C.*, says this case was rightly decided, taking the will and codicil together. "But if the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some

(a) 9 V. 433.

p. 74.

(b) See *Howe v. Dartmouth*, *infra*.

(c) 1 Mer. 193.

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observations which do not occur either in the judgment or in the argument" (a).

Certain Expressions amounting to Exoneration.—In *Webb v. Jones* (b) the testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and all other debts, *the residue to be added to his personal estate*; *Keayon, M. R.* held the personal estate to be exonerated, upon the ground, it is presumed, that the testator clearly showed that he did not contemplate the possibility of the whole personalty being applied before the realty, which it might have been if it was to be applied in its natural order (c).

So where a testator declares that he has charged his lands with the payment of his debts in order that the personalty may *come clear to the legatee* (d), or where he has directed the proceeds of his real estate to be applied "in part payment" of certain legacies (e).

In *Dawes v. Scott* (f) a testator devised an estate at C., and bequeathed certain specific chattels, upon trust to sell, and in the first place to pay all his just debts, funeral and testamentary expenses and legacies, and after giving some pecuniary legacies, declared that the moneys to arise by such sale as aforesaid, *should be "the fund primarily applicable to the discharge of his said debts, funeral and testamentary expenses and legacies."* And in case it should be insufficient, by a codicil charged his H. estate "with the payment of so much money as should be requisite to make good the deficiency;" it was held by *Leach, M. R.*, that the personal estate was only liable after the two estates had been exhausted; "for the C. estate and the articles to be sold therewith, are expressed to be the primary fund, and the plain intention of the testator is, that the H. estate should be the secondary fund" (g).

It may appear by implication that it was the intention of the

(a) See also *Brydges v. Phillips*, 6 V. 570; *Davies v. Ashford*, 15 Si. 2d, but see *Anderton v. Cooke*, 1 B. Ch. 456; *Williams v. Llandaff*, 1 C. 254; *Dawes v. Scott*, 5 Russ. 32; *Butler*, (1894) 3 Ch. 250.
(f) *Bro. Ch.* 60; 1 R. R. 29.
(g) *Malcross v. Wright*, 12 B. 505; *Fis. v. P.*, 2 Keen, 610; but see *Wy. v. Heniker*, 2 My. & K. 635.

(d) *March v. Fowke*, Cas. t. Finch, 414.

(e) *Bunting v. Marriott*, 19 B. 163.

(f) 5 Russ. 32.

(g) *Bateman v. Roden*, 1 Jo. & Lat. 365; *Evans v. E.*, 17 Si. 106; *Bessant v. Noble*, 26 L. J. Ch. 236; *Kilford v. Blaney*, 31 C. D. 56; *Re Needham*, 54 L. J. Ch. 75; *Trott v. Buchanan*, *supra*, p. 13.

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testator that debts and ordinary legacies should be primarily thrown upon land and impure personalty so as to leave the residue clear for a charity. In *Wills v. Bourne* (a) the testator first gave an annuity and certain legacies; then he devised his real estate upon trust for sale, and directed the proceeds of the sale to be applied in payment of his debts, the annuity and legacies; and then he bequeathed his personal estate upon trust for payment of so much of the debts and legacies as the proceeds of the real estate might be insufficient to satisfy, and as to the residue for charity. Then came a direction that only such parts of his estate should be included in the residue as might by law be bequeathed to charitable purposes. It was held by *S. Thorne, C.*, that the testator having excluded impure personalty from the residue it followed by *necessary implication* that the impure personalty must be applied for those purposes which were to be satisfied before a residue was arrived at, and be applied in payment of the debts and legacies. It is presumed only in the event of the proceeds of the real estate proving insufficient for that purpose (b).

In *Forrest v. Prescott* (c) a testatrix gave her real estate in trust for her two daughters, M. and S., for life and afterwards each moiety was to go to the sons of each of her daughters and their families; and after giving various legacies she left the residue of her estate to her granddaughters. By a codicil the testatrix directed that certain debts incurred by her, for her son-in-law, J. M., should be exclusively, and in the first instance, borne by and paid out of the M. moiety of her real estate, exempting the S. moiety from payment of such debts. It was held that the codicil amounted to an express exoneration of the personal estate: and that the moiety of her real estate devised to the M. family was primarily liable to the debts (d).

Lapse.—Where the testator has exempted personalty which he has bequeathed from its primary liability to debts, the exemption will not be extended for the benefit of next of kin who take the personalty in consequence of a lapse. In *Waring v. Ward* (e), *Arden, M. R.*, puts this case. "If an estate be given to A. and the personal estate to B. exempt from debts, that exemption is to be considered as intended only for the benefit of B., that he shall not pay those

(a) 16 Eq. 487.

(c) 10 Eq. 545.

(b) *Miles v. Harrison*, 9 Ch. 316; *Robertson v. Broadbent*, 8 App. Cas. 812; *Re Arnold*, 37 C. D. 644.(d) See also *Booth v. Blundell*, 1 Mer. 193.

(e) 7 V. 332.

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debts to which he would be liable if no such provision had been made; and it is not a general exemption of the personal estate." It follows, therefore, that on the death of B., the next of kin who took the personal estate would take it subject to the payment of the debts (*a*).

In *Kilford v. Bluney* (*b*) a testatrix devised her real estates in trust to pay funeral and testamentary expenses, debts, and legacies, and she directed the proceeds of sale of her leaseholds should be an auxiliary fund for such payments; and all her personal estate she bequeathed to her trustees in trust for sale, the proceeds to be for certain charities. It was held there was a sufficient intention to exonerate, but part of the bequest to charities failing, and going to the Crown in default of next of kin, it was held the right to exoneration failed as to such bequest (*c*). But if the personalty exempted has not been bequeathed to any one, it is exempted for all purposes, and, therefore, for the benefit of the next of kin (*d*).

No Bequest of Personalty.—Appointment of Executor.—No inference of an intention to exonerate the personalty arises from the appointment of an executor, who, there being no bequest of the personalty, was entitled to it by such nomination, although the debts and funeral expenses are thrown upon the land (*e*), nor where he is a trustee of it for the next of kin (*f*), upon the principle, that there is no specific disposition of the residuary personal estate. But it is clear that the executor may take the personal estate, either beneficially or as trustee for the next of kin, exonerated from the payment of debts and legacies, if another fund is provided for their payment, and the personalty has, by express words, been exempted (*g*).

Charge of, or Trust to pay Legacies.—Where there is a simple gift of an annuity or legacy, followed by a charge thereof upon the real estate, the personal estate in such case is primarily liable, and the real estate is only charged in aid of the personal estate (*h*). Even it seems where the annuity is charged upon the land with powers of distress and

(*a*) *Hale v. Cox*, 3 Bro. Ch. 322; *Hancox v. Abbey*, 11 V. 186, 8 R. R. 124; *Nool v. Henley*, 7 Price, 241; *Dacre v. Patrickson*, 1 Dr. & Sm. 186; *Coventry v. C.*, 2 Dr. & Sm. 470.

(*b*) 31 C. D. 56.

(*c*) *Browne v. Groombridge*, 4 Madd. 195, not being followed.

(*d*) *Milnes v. Slater*, 8 V. 295; *Fisher v. F.*, 2 Keen, 616; *Dacre v. Patrickson*, 1 Dr. & Sm. 186; *Re Kirk*, 21 C. D. 431.

(*e*) *Gray v. Minnethorpe*, 3 V. 103.

(*f*) *McClelland v. Shaw*, 2 Sch. & L. 538.

(*g*) *Milnes v. Slater*, *supra*.

(*h*) *Paget v. Huish*, 1 Hom. & M. 663.

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entry (a). So where there is a *general charge of legacies* upon land, or a devise in trust to pay *legacies* generally, the personal estate will be the primary fund for their payment (b). But the will may show an intention to make legacies *primarily* payable out of another fund (c).

Trust to Pay certain Legacies.—But where there is a *trust* to pay *particular sums* out of real estate, as if A. devise real estate to B. *upon trust* to pay 1000*l.* to C. such sum is considered as part of the real estate, and the personal estate will not be liable to the payment, even upon a deficiency of the real estate (d). Nor will it even though there be a direction at the end of the will, that the personal estate should be applied in payment of *legacies* in exoneration of the real estate (e). So in *Woodhead v. Turner* (f) it was held, upon the language of the will, that an annuity was primarily payable out of specifically devised real estates (g).

And should the testator sell the estate out of which a sum is to be paid, the legacy will be adeemed (h). Where, however, the legacy appears to be a *demonstrative* legacy, there the fund pointed out for its payment, whether real or personal, is primarily liable, but upon its failure the demonstrative legacy will be payable out of the general assets (i).

(a) *Patching v. Barnett*, 49 L. J. Ch. 665.

(b) *Kirke v. K.*, 4 Russ. 419; *Roberts v. R.*, 13 Si. 349; *Davies v. Ashford*, 15 Si. 42; *Onsley v. Anstruther*, 10 B. 453; *Re Ovey*, 31 C. D., p. 118.

(c) *Greaves v. Powell*, 2 Vern. 248; *Boughton v. B.*, 1 H. L. Cas. 406; *Whieldon v. Spode*, 15 B. 537; *Jameo v. Aglionby*, 27 B. 65; *Re Needham*, 54 L. J. Ch. 75; *Thynne v. St. Maur*, 55 L. T. 753.

(d) *Hancox v. Abbey*, 11 V. 179; *Gittins v. Steele*, 1 Sw. 24; *Lamphier v. Despard*, 1 Con. & Law. 200; *Dickin v. Edwards*, 4 Ha. 273; *Bateman v. Roden*, 7 Ir. Eq. R. 240; *Jones v. Bruce*, 11 Si. 221; *Ashby v. A.*, 1 Coll. Ch. R. 349; *Roberts v. R.*, *supra*; *Evans v. E.*, 17 Si. 102; *Coard v. Holderness*, 22 B. 391; *Gordon v. Duff*, 28 B. 519.

(e) *Spurway v. Glynn*, 4 V. 483.

(f) 4 De G. & Sm. 429.

(g) *Ion v. Ashton*, 28 B. 379; *Daunt v. D.*, 13 Ir. Ch. Rep. 175; *Allan v. Gott*, 7 Ch. 439; *Weldon v. Bradshaw*, 7 Ir. R. Eq. 168; *Sinnett v. Herbert*, 12 Eq. 201; *Conron v. C.*, 7 H. L. Cas. 168; *Spong v. S.*, 3 Bli. 84.

(h) *Newbold v. Roadnight*, 1 Russ. & M. 667.

(i) *Savile v. Blacket*, 1 P. W. 778; *A.-G. v. Parkin*, Amb. 566; *Cartwright v. C.*, 2 Bro. Ch. 114; *Roberts v. Pocock*, 4 V. 150; *McClelland v. Shaw*, 2 Sch. & L. 538; *Smith v. Fitzgerald*, 3 V. & B. 2; *Walker v. Lantons*, 1 Y. & J. 557; *Mann v. Copland*, 2 Madd. 252; *Fowler v. Willoughby*, 2 S. & S. 551; *Willox v. Rhodes*, 2 Russ. 452; *Sidbotham v. Watson*, 11 Ha. 170; *Colville v. Middleton*, 3 B. 570; *Fream v. Dowling*, 20 B. 624; 4 Eq. 145 (n.); *Williams v. Hughes*, 24 B. 474; *Page v. Huish*, 1 Hem. & M. 663; and note to *Ashburner v. Macguire*, post.

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Trust to Pay Certain Debts.—But it appears that a devise of real estate, upon trust to raise *a certain sum for payment of debts* (a), or to pay a particular debt to which the personal estate is already liable, will render the real estate the primary fund for the payment of such sums (b). But in *Noel v. Healey* (c), *Richards*, C. B., observed,

"That he could not make any distinction between a direction that real estate should be chargeable with a particular debt of 20,000*l.*, and a devise of real estate subject to all the testator's debts; for the 20,000*l.* was only part of those debts." See the remarks on this case in *Jarman* (1893) p. 1486. And it would seem from some cases that the charge of a debt on real estate, not being already a charge thereon, will not affect the primary liability of the personal estate (d), unless where the testator has likewise imposed the payment of the debt as a *personal obligation* on the devisee (e).

Charge of Debts on Specific Fund.—Where a *specific* personal fund is subjected to charges which otherwise would fall upon the general personal estate, as debts, legacies, funeral and testamentary expenses, such specific fund will not be the auxiliary fund for their payment as in the case of land, see *supra*, but the primary fund (f). Where, however, the residue is undisposed of it will be primarily liable (g).

Although the payment of debts is thrown by a testator upon a particular fund, and he devises or bequeaths other property discharged from such debts, if the particular fund should prove insufficient for payment of debts, the other property will be applicable for that purpose in the usual order. In *Brooke v. Warnick* (h) the testator devised an estate which he had mortgaged, and bequeathed specific personal property, and his residuary personal estate, to different persons, *freed and discharged* from his

(a) *Clutterbuck v. C.*, 1 My. & K. 15.

(b) *Hancox v. Abbey*, 11 V. 179; *Wolby v. Rockliffe*, 1 Russ. & M. 571; *Evans v. Cockeram*, 1 Coll. Ch. R. 428; *Bateman v. Roden*, 1 Jo. & Lat. 356; *Osote v. C.*, 3 Jo. & Lat. 178.

(c) 7 Price, 241; *Dan.* 211.

(d) *Quennell v. Turnor*, 13 B. 240; *Bickham v. Cruttwell*, 3 My. & C. 763.

(e) *Wolby v. Rockliffe*, 1 Russ. & M. 571; *Clutterbuck v. C.*, 1 My. & K. 15.

(f) *Choat v. Yeates*, 1 J. & W. 102;

Phillips v. Eastwood, 1 L. & G. t. Sugden, 291; *Evans v. E.*, 17 Si. 106; *Webb v. De Beauvoisin*, 31 B. 573; *Gilbertson v. G.*, 34 B. 354; *Coventry v. C.*, 2 Dr. & Sm. 470; *Bootle v. Blundell*, 1 Mer. 221; *Re Butler*, (1894) 3 Ch. 250.

(g) *Hewett v. Snare*, 1 De G. & Sm. 333; *Holford v. Wood*, 4 V. 76; *Newbigin v. Bell*, 23 B. 386; *Corbett v. C.*, 8 Ir. R. Eq. 407; *Re Hastings*, 55 L. J. Ch. 278.

(h) 1 H. & Tw. 142.

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debts, &c., and he devised real estate to trustees, upon trust to sell and pay his debts. The estate devised for payment of debts was insufficient for that purpose. It was held by *Coltatham, C.* that the residue was primarily liable, and that the devisees of the mortgaged estates were entitled to exoneration thereout. "The only way," said his Lordship, "in which this case was attempted to be argued was this; that the gift of the residue was a specific gift. This is founded on the supposition that the testator has disposed of it as a particular fund. There may be many cases where residuary clauses must be considered, not as general dispositions of the residue, but as dispositions of the residue of a particular fund, and such gifts would be equally specific with gifts of other parts of the fund. In an ordinary gift of the residue, part to A. and part to B., and the residue to C, C. is as much a specific legatee as either of the former legatees A or B. But this is a general gift of the residuary estate. What, then, is a residuary estate? That which remains after payment of the debts. The testator gives it discharged from his debts; but he cannot do that, unless he provides for the payment of them by other means. Therefore, if he has expressed an intention of doing what he is incapable of effecting, it must fail."

And where a testator expressly exempts his personal estate from payment of his debts, estates specifically devised not charged with payment of his debts will be applicable after real estates devised upon trust for their payment, and before resort can be had to the personal estate (*a*). And where real property given expressly charged with payment of debts, funeral and testamentary expenses, proved to be insufficient, and the personal estate being given specifically, was exempt from its primary liability to such charges, it was held that they must be borne *patri passu* by such personal estate and other real estate specifically devised (*b*).

3. Exoneration in respect of Mortgaged Estates in cases not within the Real Estate Charges Acts.

The previous law upon this subject is fully stated in *Jarman* (1893, pp. 1442, et seq., and in former editions of this work. The following is a short statement of it. The personal estate has been held primarily liable in the following cases: (1) Where there is a devise "subject to the mortgage" (*c*), or a devise of land upon

(*a*) *Morrow v. Bush*, 1 Cox, 185;
Young v. Y., 26 B. 522.

(*b*) *Powell v. Riley*, 12 Eq. 175.

(*c*) *Serle v. St. Eloy*, 2 P. W. 386;
Bootle v. Blandell, 1 Mer. 221; *Goodwin v. Leo*, 1 Kay & J. 377.

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trust to sell and pay mortgages (*a*). (2) In the case of a vendor's lien (*b*).

But in the following cases the mortgaged estate was held primarily liable:

- (1) Where the mortgaged debt was not the personal debt of the deviser or ancestor, and had not been adopted by him (*c*).
- (2) Where there had been no benefit from the charge to the personalty of the person creating it (*d*).
- (3) Or where there had been a benefit to the personal estate but the inference from the circumstances was that the land was to be primarily liable (*e*).

4. The Exoneration of Mortgaged Estates under the Real Estate Charges Acts, 1854, 1867, and 1877.

In accordance with the general rule, by which the personal estate is the primary fund for payment of debts, unless by express words or manifest intent it is exempted, such personal estate was before the above Acts the primary fund for payment of a mortgage debt *contracted by a deceased person himself*; and, whether the estate descended or was devised, the heir-at-law in the one case, and the devisee in the other, was entitled to have the land exonerated from the mortgage debt by the primary application of the general personal assets, so far as they would extend, unless, in the case of a devise, it appeared from the will to have been the testator's intent that the land should be taken *en masse* (*f*).

17 & 18 Vict. c. 113. (Locke King's Act. 11th August, 1854).

S. 1. "When any person shall after the 31st of December, 1854, die seised of or entitled to any estate, or interest in any land or other hereditaments which shall at the time of his death be

(*a*) Wythe v. Hemmiker, 2 My. & K. 635; but see Webb v. Jones, *supra*, p. 18.

(*b*) Yonge v. Furze, 20 B. 380; see now *infra*, p. 31.

(*c*) Scott v. Beecher, 5 Madd. 96; Swainson v. S., 6 De G. M. & G. 648, and the principal case, p. 1.

(*d*) Coventry v. C., 2 Dr. & Sm. 470; Lanoy v. Athol, 2 Atk. 444; Loosemore v. Knapman, Kay, 123.

(*e*) Jenkinson v. Harcourt, Kay, 688;

Vandeleur v. V., 3 Cl. & Fin. 82; Barham v. Clarendon, 10 Ha. 126; but see Redington v. R., 1 Ball & B. 131.

(*f*) Davies v. Bush, 4 Bli. N. S. 305; Bartholomew v. May, 1 Atk. 487; Pockley v. P., 1 Vern. 36; Belvedere v. Rochfort, 5 Bro. P. C. 299. For the previous law as to the exoneration of mortgaged estates, see *supra*, p. 23, Jarman, 1893, p. 1442; Seton, 1893, p. 1292; and the last edition of this work, 1886, p. 754.

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charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will, deed, or other document, *have signified any contrary or other intention* the *heir or devisee* to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: *Provided* always that nothing herein contained shall affect or diminish any right of the *mortgagee* on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the *personal estate* of the person so dying as aforesaid, *or otherwise*: *provided* also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January one thousand eight hundred and fifty-five."

S. 2. "This Act shall not extend to Scotland."

"Any Estate or Interest in Lands," &c.—This Act only comprehends "any estate or interest in any land or *other hereditaments*;" the law, therefore, under that Act, remained unaltered as to the primary liability of the general personal estate, to satisfy charges on property not coming within those terms. Copyholds as well as freeholds are within the Act (a), but *leaseholds for years* are, by the language of the Act, which speaks of "the *heir or devisee* to whom such lands or hereditaments shall *descend or be devised*," excluded from its operation (b). But, by 40 & 41 Vict. c. 34, p. 31, *infra*, the Act is extended to lands and hereditaments of all tenures. Land devised upon trusts for conversion, and *taken in its converted state*, is *scilicet* not an interest in lands within the meaning of the Act: and a person to whom the *proceeds* of land have been bequeathed by a testator who had mortgaged it, can demand the payment of the mortgage out of the general personal estate (c).

"Charged by way of Mortgage." The meaning of mortgage is extended by 40 & 41 Vict. c. 34, *infra*, p. 31. This Act only applies

(a) *Piper v. P.*, 1 John. & H. 91.

Re Wormsley's Estate, 4 C. D. 665.

(b) *Solomon v. S.*, 12 W. R. 540;

(c) *Lewis v. L.*, 13 Eq. 225.

Gall v. Fenwick, 43 L. J. Ch. 178;

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where there is a defined and specified charge on a specified estate (*a*). It applies to an equitable mortgage of freeholds by deposit of deeds with a memorandum (*b*), or without a memorandum (*c*); and though the memorandum stated that the deposit was made "as a collateral security" for money lent on a promissory note (*d*). A vendor's lien for unpaid purchase-money, however, is not within this Act (*e*).

"Or any other real estate of such person."—This means "other real estate not descended or devised to such heir or devisee" (*f*).

"As between the different persons," &c.—If the Crown takes personal estate in default of next of kin, it takes it free from the mortgage debts (*g*).

"Be charged every part according to its value," &c.—This provision, with the other provisions of the Act, is subject to a contrary intention appearing by the will or other document of the person creating the charge. Hence if freeholds mortgaged together to secure one sum, on the mortgagor's death, went to different devisees, in the absence of any intention to the contrary on his part, the devisees would have to contribute rateably to pay the mortgage debt. So if freeholds, leaseholds, or other personal estate, such as policies of assurance, were mortgaged together, on the death of the mortgagor intestate, in the absence of any contrary intention, the heir-at-law and executor must, under the Act, bear the burthen rateably (*h*).

Where moreover there is a further security given at a subsequent time, for the original and an additional debt, without anything more, such further security will not be considered as secondary as between different persons claiming the two properties from the mortgagor, and they will all contribute rateably towards payment of the amount due (*i*). The mortgagor, however, may not only by express terms, but also by implication in the mortgage deed, or by the will, declare

(*a*) *Hepworth v. Hill*, 30 B. 476.

(*b*) *Pembroke v. Friend*, 1 John. & H. 132.

(*c*) *Davis v. D.*, W. N. (76) 242.

(*d*) *Coleby v. C.*, 2 Eq. 803.

(*e*) *Hood v. H.*, 26 L. J. (N. S.) Ch. 616; *Barnwell v. Fremonger*, 1 Dr. & Sm. 255. But see the amending Act, *infra*, p. 31.

(*f*) *Re Newmarch*, 9 C. D. 17.

(*g*) *Dacre v. Patrickson*, 1 Dr. & Sm.

186; *Kilford v. Blaney*, 31 C. D. 56.

(*h*) *Evans v. Wyatt*, 31 B. 217; *Trestrail v. Mason*, 7 C. D. 455; *Re Newmarch*, *supra*; *Leonino v. L.*, 10 C. D. 100; *Heveningham v. H.*, 2 Vern. 355.

(*i*) *Leonino v. L.*, *supra*; *Athill v. A.*, 16 C. D. 225; overruling *Lipscomb v. L.*, 7 Eq. 501; *De Rochfort v. Dawes*, 12 Eq. 540.

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his intention as between the two estates how the debt is to be primarily borne (*e*). The mere statement, however, in a second mortgage of other property, that it is "a collateral security," is not sufficient to show that it was intended that property comprised in a former mortgage should be primarily liable (*b*), although where that word was used, it was held, as *the result of the whole transaction*, that one property was not to be called upon to provide for payment of part of the debt (*c*). Where a testator specifically devised part of the mortgaged estate, and left the other part to pass by a general residuary devise, it was held by *Romilly, M. R.* (*d*), to be an expression of his intention that the part which passed by the general residuary devise should be primarily liable to the payment of the whole mortgage debt, in exoneration of the part which was specifically devised, and that therefore Locke King's Act did not apply. This case was questioned by *Jessel, M. R.* (*e*), and it is now established that where property is subject to a mortgage and part is devised to specific, and part to residuary devisees (both devises being now considered specific), each part of the estates must contribute rateably (*f*).

A party seeking *contribution* must show not only that there is a charge on both properties, but also that they are equally liable *inter se* (*g*).

Under Locke King's Act, unless by the signification of a contrary intention the primary liability of the land in mortgage to bear the mortgage debt be thrown upon other real or personal property of the party dying seised of or entitled to such land, the devisee or heir-at-law cannot claim a right to have land in mortgage exonerated by the application for that purpose of any of the real or personal estate of the testator or ancestor. As far as they are concerned, the land in mortgage must solely bear its burden. But where a contrary intention has been shown under the Act, by the substitution of another fund for the exoneration of the property in mortgage, it has been held by the greater weight of authority that if the fund be

(*a*) *Leonino v. L.*, *supra*; *De Rochfort v. Dawes*, *supra*; *Stringer v. Harper*, 26 B. 33.

(*b*) *Athill v. A.*, *supra*; *Early v. P.*, 16 C. D. 214 (n.); *Leonino v. L.*, *supra*.

(*c*) *Bute v. Cunyngame*, 2 Russ. 275.

(*d*) *Brownson v. Lawrence*, 6 Eq. 1.

(*e*) *Sackville v. Smyth*, 17 Eq. 153.

(*f*) *Hensman v. Fryer*, 3 Ch. 420; *Gibbins v. Eyden*, 7 Eq. 391; *Lancefield v. Iggulden*, 10 Ch. 236; *Sackville v. Smyth*, 17 Eq. 153; *Re Smith*, *Hannington v. True*, 33 C. D. 195.

(*g*) *Re Dunlop*, 21 C. D. 583.

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insufficient to pay off the mortgage, the deficiency must be borne by the mortgaged estate (*a*).

"A Contrary or Other Intention."—See as to persons dying after 1867 or 31st December, 1877, note to 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34, *infra*. Judges, as might be expected, have differed much as to the meaning and application of these words (*b*).

The intention is to be gathered from the will of the testator, or some document executed by or binding upon him, and, *scilicet*, a will executed before the mortgage would suffice (*c*).

It has been decided that a mere direction by the testator that the debts "shall be paid as soon as may be" (*d*), even although the real estate in mortgage be devised in strict settlement (*e*), or that debts should be paid "out of his estate" (*f*), or by his "executors out of his estate" (*g*), the source from which the payment is to be made not being mentioned, will not show a "contrary or other intention" sufficient to exonerate the mortgaged estate from its primary liability under this Act, but see as to persons dying after 1867 note to 30 & 31 Vict. c. 69, *infra*.

Where, however, the residue of the real and personal estate (*h*), or of the *personal estate*, was bequeathed upon trust to pay (*i*) or subject to the payment of debts (*k*), without express reference to mortgage debts, these words have been held sufficient to show a contrary intention within the meaning of the Act (*l*). In *Maxwell v. M.* (*m*), it was held that a Scotch heritable bond, given by a domiciled Englishman, was payable in exoneration of the estate upon which the bond was charged out of his residuary personal estate,

(*a*) *Redhouse v. Mold*, 35 L. J. Ch. 67; *Gall v. Fenwick*, 43 L. J. Ch. 178; *Smith v. Moreton*, *contra* 37 L. J. Ch. 6; *Allen v. A.*, 30 B. 403; *Greated v. G.*, 26 B. 621.

(*b*) See observations of *Westbury, C.*, in *Rolfe v. Perry*, 11 W. R. 674; see also *Woolstencroft v. W.*, 2 De G. F. & J. 347; *Eno v. Tatham*, 11 W. R. 475; *Mellish v. Vallins*, 2 John. & H. 194.

(*c*) *Re Campbell*, (1893) 2 Ch. p. 214.

(*d*) *Pembroke v. Friend*, 1 John. & H. 132.

(*e*) *Cooto v. Lowndes*, 10 Eq. 376.

(*f*) *Brownson v. Lawrance*, 6 Eq. 1.

(*g*) *Woolstencroft v. W.*, *supra*.

(*h*) *Allen v. A.*, 30 B. 395; *Greated v. G.*, 26 B. 621; *Stone v. Parker*, 1 Dr. & Sm. 212; *Newman v. Wilson*, 31 B. 33; *Re Nevill*, 39 L. J. Ch. 511; *Rawson v. McCausland*, 8 Ir. R. 124, 617.

(*i*) *Moore v. M.*, 1 De G. J. & S. 602.

(*k*) *Eno v. Tatham*, *supra*; *Mellish v. Vallins*, *supra*.

(*l*) Also *Smith v. S.*, 3 Gif. 263; *Smith v. S.*, 10 Ir. Ch. Rep. 461; *Buckley v. B.*, 19 L. R. Ir. 544; *Porcher v. Wilson*, 14 W. R. 1001; *Greated v. G.*, *supra*; *Re Bull*, 49 L. T. 592.

(*m*) L. R. 4 H. L. 596.

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bequeathed for payment of his "just debts" (*a*). When the statute is excluded by the substitution of another fund the estate, it seems, is exonerated to the extent of that fund only (*b*).

"**Provided also,**" &c.—With regard to the operation of this last proviso, an heir taking *by descent* after the passing of the Act will not come within such proviso, and consequently he will not be entitled to exoneration, although the mortgage deed by which the equity of redemption was reserved to his ancestor and his heirs was executed (*c*), or the will by which the personalty is bequeathed was made (*d*) before the 1st of January, 1855. An heir-at-law, or customary heir of a testator, taking by descent an estate which has been the subject of a lapsed devise, in a will made before the 1st day of January, 1855, will not come within it (*e*). Where a devisee takes the mortgaged estate under a will made before the 1st of January, 1855, he will come within the meaning of the proviso, and be entitled to exoneration, although the deviser may have executed another will after that date which, without affecting the devise, operated as a republication of the will (*f*).

30 & 31 Viet. c. 69. (25 July, 1867.)

S. 1. "In the construction of the will of any person who may die after the 31st day of December, 1867, a general direction that the debts, or that all the debts of the testator, shall be paid out of *his personal estate*, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act (17 & 18 Viet. c. 113), unless such contrary or other intention shall be further declared by words *expressly* or *by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.*"

With regard to this Act, it has been observed that as it was a construing and explaining Act, it did not profess to amend the former Act, but to set aside the interpretation that had been put upon it—it was, in fact, a polite way of overruling the decisions of the Court of Chancery: per *Jessel*, M. R. (*g*).

(*a*) *Rowson v. Harrison*, 31 B. 207, *contra*, but this case was overruled in *Moore v. M.*, *supra*.

(*b*) *Rodhouse v. Mold*, 33 L. J. Ch. 67.

(*c*) *Piper v. P.*, 1 John. & H. 91.

(*d*) *Power v. P.*, 8 Ir. Ch. Rep. 840.

(*e*) *Nelson v. Page*, 7 Eq. 25.

(*f*) *Rolfe v. Perry*, *supra*.

(*g*) *Re Newmarch*, 9 C. D. 17.

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"Contrary Intention." (See this note, p. 25.)—If a testator now wishes to give a direction which shall be deemed under this Act, 30 & 31 Vict. c. 69, a declaration of an intention contrary to the rule laid down in Mr. Locke King's Act, it must be a direction applying to his mortgage debts in such terms as unmistakably refer to or describe them (*a*).

Act not excluded.—In the following cases, therefore, the Act will not be excluded. Where there is a mere direction to executors to pay all just debts (*b*), or to pay all my just debts out of my personal estate in exoneration of my real estate (*c*). Where a testator, after specifically devising certain real estates to his wife during widowhood, gave the residue of his real and personal estate to trustees upon trust to convert and pay thereout his debts, *including the debts due on mortgage of the property*, given to his wife, it was held by the C. A. that the will did not indicate any such contrary intention as to exclude the mortgages on the residuary real estate from the operation of Locke King's Act, and that they must be paid out of the proceeds of the mortgaged estate; "The reasonable view of the testator's intention," said *James, L. J.*, "is that he considered the mortgages on the estates which were to be immediately sold would be paid out of the proceeds of the sale of those estates and that the net proceeds only would go into the mixed fund out of which the estates that were not to be sold at once would be exonerated. The will does not *show any intention to exclude the operation of the Act as to the mortgage debts, with reference to which nothing is said*" (*d*). Where there is a charge of debts on part of a testator's real estates in exoneration of the rest, *without specially referring to his mortgage debts*, although the charge is in aid of the personal estate (*e*). Where the personal estate is bequeathed subject to debts, a specific devise of part of the mortgaged estate, while the rest is comprehended in a residuary devise, will not exonerate the specifically devised land (*f*).

Act excluded.—F. directed his private debts to be paid out of the proceeds of certain policies, and bequeathed his residue subject to payment of his trade debts. After date of will F. deposited title deeds of real estate with his bankers, to secure overdrawn account.

(*a*) *Nelson v. Page*, 7 L. J. 25.

(*b*) *Nelson v. Page*, *supra*.

(*c*) *Re Rossiter*, 13 C. D. 555; *Leonino v. L.*, 10 C. D. 460.

(*d*) *Elliot v. Deansley*, 16 C. D.

(*e*) *Re Newmarch*, 9 C. D. 17.

(*f*) *Sackville v. Smyth*, 17 Eq. 153;

Buckley v. B., 19 L. R. 1r. 544; *Lewis v. L.*, 13 Eq. 218; *Re Smith*, 33 C. D. 195.

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Held he had made a particular specific provision which excluded the Act (*a*).

S. 2. "In the construction of the said Act, and of this Act, the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a *testator*."

"**Mortgage.**" (See note, "Mortgage or other," &c., infra.) This section applies only to lands or hereditaments purchased by a "testator," the heir-at-law of an *intestate* has, therefore, been held to be entitled to have the lien for unpaid purchase-money, upon an estate purchased by the intestate, paid for out of his personal estate (*b*).

40 & 41 Vict. c. 34. (2nd August, 1877.)

S. 1. "The Acts mentioned in the schedule hereto shall as to any testator or intestate dying after the 31st of December, 1877, be held to extend to any testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of *whichever tenure* which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any *lien* for unpaid purchase-money, and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of, or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate."

"**In the Schedule.**"—The Acts in the schedule are 17 & 18 Vict. c. 113 and 30 & 31 Vict. c. 69.

"**Land or Other Hereditaments.**"—By virtue of this section the 17 & 18 Vict. c. 113, is extended to leaseholds (*c*).

"**Mortgage or other,**" &c., "including," &c.—As to the way in which these words should be read (*d*). Land delivered in execution under an *elegit* is included in them (*d*). This Act applies the

(*a*) *Re Plock*, 37 C. D. 677; *Re Nevill*, 59 L. J. Ch. 511, which went on much the same grounds.

(*b*) *Harding v. H.*, 13 Ir. R. Eq.

193; see 40 & 41 Vict. c. 34, *supra*.

(*c*) *Re Kershaw*, 37 C. D. 674.

(*d*) *Re Anthony*, (1892) 1 Ch. 450.

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rule as to vendor's lien to the administration of the estate of an intestate (*a*), but, observed *Kay, J.*, in *Re Cockcroft*, it seems to limit the exception of the expression of a contrary intention to the case of a testator, the draftsman apparently forgetting that it might be by deed or other document as well as by will.

5. Order of Application of Assets (1) Generally : (2) Where Mortgaged Estate is Exonerated.

Generally.—The order in which assets of a deceased person are applied in payment of debts is as follows:—

- (1) The general personal estate, or residuary personalty, not specifically bequeathed or exonerated (*b*).
- (2) Real estate devised in trust for payment of debts (*c*).
- (3) Real estate descended (*d*), whether possessed by the testator at the date of his will or acquired after (*e*).
- (4) General pecuniary legacies, *pro rata*. In *Re Bate* (*f*), *Kay, J.*, held that the whole of the personal estate not specifically bequeathed must be applied in payment of debts before the real estate charged was resorted to. It does not appear that any distinction was suggested in this case between an express charge of debt on the real estate, and a constructive charge, but it was suggested in argument that general pecuniary legacies were in fact part of the general pecuniary estate not specifically bequeathed (*g*). Pecuniary and demonstrative legacies are specific so far only as the appropriated fund is sufficient to pay them (*h*).
- (5) Real or personal property charged with payment of debts and devised, or suffered to descend, or specifically bequeathed subject to such charge, rateably *inter se* (*i*). Where part

(*a*) *Re Cockcroft*, 24 C. D. 94; *Re Kild*, (1894) 3 Ch. 338.

(*b*) See the principal case, and cf. *Re Bate* and *Sellon v. Watts*, *infra*; *Re Ovey*, 8 App. Cas. 812; 31 C. D. 113; *Trott v. Buchanan*, *supra*, p. 13.

(*c*) *Harwood v. Oglander*, 8 V. 124; *Phillips v. Parry*, 22 B. 279.

(*d*) *Harwood v. Oglander*, *supra*.

(*e*) *Milnes v. Slater*, 8 V. 295.

(*f*) 43 C. D. 600.

(*g*) This case, *Re Bate*, was not fol-

lowed in *Re Stokes*, 67 L. T. 223, nor in *Re Salt*, (1895) 2 Ch. 203, and see *Re Butler*, (1894) 3 Ch. 260; *Jarman*, 1893, p. 1430, note (*s*); *Seton*, 1893, p. 1407.

(*h*) See *Re Bate*, *supra*; *Sellon v. Watts*, 9 W. R. 847; *Seton*, 1893, p. 1404.

(*i*) *Wride v. Clarke*, 2 Bro. Ch. 261; *Harwood v. Oglander*; *Re Salt*, *supra*; *Re Bawden*, (1894) 1 Ch. 693.

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of the property charged lapses, the lapsed share contributes rateably (*a*).

- (6) Specific and residuary devises and specific bequests, *not* charged with debts, rateably *inter se* (*b*). But when a specific bequest is made which has been charged with a debt in the lifetime of the testator, then, although the real estate is charged with the payment of debts, the property so specifically bequeathed must first be applied in payment of the particular debt charged upon it (*c*).
- 7) Real and personal estate appointed by will under a general power of appointment (*d*).
- (8) Widows' paraphernalia, see note to *Aldrich v. Cooper* p. 53, *infra*.

Where a Mortgaged Estate is entitled to be Exonerated from the Debt.

Where a devisee of a mortgaged estate is entitled to have the estate exonerated from the mortgage debt, the assets of the testator will be applicable for the payment of such debt in the following order :

1st. The general personal estate not specifically bequeathed or exonerated (*e*).

2nd. Lands expressly devised for payment of debts (*f*).

3rd. Lands descended to the heir (*g*), whether acquired before or after the date of the will (*h*). As to a lapsed share (*i*).

4th. Lands devised charged with debts (*k*). And in this last case all the devisees, including the devisee of the mortgaged estate, *if so charged*, must contribute pro rata towards payment of the mortgaged debt (*l*).

(*a*) *Wood v. Ordish*, 3 Sm. & G. 125.

(*b*) *Manning v. Spooner*, 3 V. 117; *Hensman v. Fryer*, 3 Ch. 420; *Lancefield v. Iggalden*, 10 Ch. 136.

(*c*) *Re Butler*, (1894) 3 Ch. 259; and cf. *O'Neal v. Mead*, 1 P. W. 693; *Halliwell v. Tanner*, 1 Russ. & M. 633.

(*d*) *Fleming v. Buchanan*, 3 De M. & G. 976; *Jenny v. Andrews*, 6 Madd. 264; and cf. Wills Act, s. 27.

(*e*) *Phillips v. P.*, 3 Bro. Ch. 723.

(*f*) *Serle v. St. Eloy*, 2 P. W. 386; *Phillips v. Parry*, 22 B. 279; *Freeman*

v. Ellis, 1 Hem. & M. 758.

(*g*) *Galton v. Hancock*, 2 Atk. 424; *Chaplin v. C.*, 3 P. W. 368; *Barnes v. Cawdor*, 3 Madd. 453; *Lomax v. L.*, 12 B. 285.

(*h*) *Milnes v. Slater*, 8 V. 295.

(*i*) *Fisher v. P.*, 2 Keen, 610; *Wood v. Ordish*, 1 Jur. N. S. 581.

(*k*) *Davies v. Topp*, 2 Bro. Ch. 259.

(*l*) *Carter v. Barnadiston*, 1 P. W. 505; *Middleton v. M.*, 15 B. 450; *Harper v. Munday*, 7 De G. M. & G. 369.

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Where the property subject to the mortgage is devised in part to specific and in part to residuary devisees, each part of the estate must contribute rateably (*a*).

But a devisee is not entitled to have the estate exonerated out of the personalty, as against specific devisees of real estate (*b*), amongst whom are included, notwithstanding 1 Viet. c. 26, s. 24, residuary devisees (*c*). Nor is he entitled to be exonerated as against specific legatees (*d*): nor as against pecuniary legatees (*e*)—nor as against a widow's paraphernalia (*f*); and the specific legatee of encumbered property cannot, where the general personal estate is insufficient, call upon other specific legatees or devisees to contribute, although there is a general charge of debt (*g*).

In *Hamilton v. Worley* (*h*), *Loughborough, C.*, observed: "The equity the Court affords to a person entitled to real estate by devise, to have the incumbrances upon it discharged as a debt out of the personal estate, can go no farther than this:—as between the heir or devisee of the estate and residuary legatee, it cannot interfere with the disposition of other parts, as specific or *general legatees*, much less with the interests of creditors."

The *heir*, where an estate descends subject to a mortgage, is entitled to exoneration, in cases not within the Real Estate Charges Act, first out of the general personal estate; and, lastly, out of real estate expressly devised for payment of debts (*i*).

Marshalling of Assets. If the above mentioned order has been disturbed by any creditor, equity will marshal the assets (*k*). The right of the mortgagee to obtain full payment or satisfaction of his mortgage debts out of all the assets of the mortgagor, in case the mortgage estate should be insufficient, is not affected by Locke King's

(*a*) *Gibbins v. Eyden*, 7 Eq. 391; *Sackville v. Smyth*, 17 Eq. 153.

(*b*) *Galton v. Hancock*, *supra*; *Emuss v. Smith*, 2 De G. & Sm. 722.

(*c*) *Pearmain v. Twiss*, 2 Gif. 130; *Emuss v. Smith*, *supra*; *Clark v. C.*, 34 L. J. (N. S.) Ch. 477; *Rothhouse v. Mold*, 35 L. J. Ch. 67; *Hensman v. Fryer*, 3 Ch. 420; in which case *Chelmsford, C.*, decided that a residuary devise was specific; and this decision was approved of by *Cairns, C.*, in *Lancefield v. Igoulden*, 10 Ch. 361.

(*d*) *O'Neal v. Mead*, 1 P. W. 693; *Emuss v. Smith*, 2 De G. & Sm. 722.

(*e*) *Lutkins v. Leigh*, Cas. 1, Talbot, 53; *Johnson v. Child*, 9 Ha. 87.

(*f*) 1 P. W. 730.

(*g*) *O'Neal v. Mead*, *supra*; *Halliwel v. Tanner*, 1 Russ. & M. C33; *Re Butler*, p. 32, *supra*.

(*h*) 2 V. jun. 65.

(*i*) *Hill v. London*, 1 Atk. 621; *Chester v. Powell*, 7 Jur. 389; *Yonge v. Furze*, 20 B. 380.

(*k*) See *Aldrich v. Cooper*, p. 36, and *Shelford*, R. P. Statutes, (1893) p. 381.

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Act, and it is presumed, that after having resorted to the funds already indicated, he will be entitled to payment out of the assets of the testator in the ordinary course of administration.

The election of the mortgagee to come upon the personality for payment of the mortgage debt will not determine what fund shall be ultimately charged with it: for, under the ordinary rule of marshalling the simple contract creditors, the widow or legatees would have a right to stand in his place for so much of the real estate as he should take out of the personal. They will not, therefore, be prejudiced, nor will the devisee be benefited, by the election of the mortgagee to proceed, as he undoubtedly may against the personal estate in the first instance (a).

Under Hinde Palmer's Act, 32 & 33 Vict. c. 46, a mortgagee, being (as he ordinarily is by reason of the covenant in the mortgage deed) a specialty creditor, is only entitled to be paid *pari passu* with simple contract creditors.

And under the Supreme Court of Judicature Act, 1875, 38 & 39 Vict. c. 77, s. 10 (b), in the administration of the assets of any person who may die after the 1st of November, 1875, and whose estate may prove insufficient for the payment in full of his debts and liabilities and in the winding-up of companies, a mortgagee, if he proves for his whole debt, must give up his security, or, if his security be realised or valued, he can prove only for the balance (c).

And under the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 125, the estate of a person dying insolvent may be administered in bankruptcy upon the petition of a creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive (d).

(a) *Porcher v. Wilson*, 14 W. R. 1001;
Buckley v. B., 19 L. R. Ir. 544.

(b) See Annual Practice, Part I.

(c) *Re Summers*, 13 C. D. 136.

(d) See Judicature Act, 1875, s.

10 (e), Annual Practice, Part I.

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DURHAM v. LANKESTER.
DURHAM v. ARMSTRONG.

1803. 8 V. 382; 7 R. R. 86.

Marshalling.

Mortgagee of freehold and copyhold estates, also a specialty creditor, having exhausted the personal assets, simple contract creditors are entitled to stand in his place against both the freehold and the copyhold estates, so far as the personal estate has been taken away from them by such specialty creditor.

Mortgage of freehold estate, with a covenant for better securing the payment, to procure admission to and to surrender a copyhold estate, and in the meantime to stand seised in trust for the mortgagee. A primary mortgage of both estates; and the freehold not first applicable.

In these causes the usual decree was made for an account of what was due to the plaintiff Aldrich, a simple contract creditor of the intestate John Cooper, and all other the creditors; and, in case the creditors by specialty should exhaust any part of the personal estate, it was declared, that the simple contract creditors were entitled to stand in their place, &c.

The Master's report stated, that the intestate died seised of freehold estates of inheritance, subject to a mortgage made by him, by indentures dated the 6th of October, 1791, for 1300*l.*; by which indentures also, for better securing the payment, he covenanted with the mortgagee to procure himself to be admitted to copyhold estates, and that he would surrender them to the mortgagee; and that until such surrender, he would stand seised of the premises in trust for the mortgagee.

The intestate died in June, 1792, not having been admitted to the copyhold estates, leaving five sisters his coheirresses-at-law, who, in September, 1792, were admitted to the copyhold estates as coheirresses of the intestate, and immediately afterwards surrendered to the mortgagee for securing what was due upon the mortgage and two bonds by the intestate to the mortgagee. The widow of the intestate took

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out administration, and paid out of the personal estate 767*l.* a part of the mortgage and bonds. The personal estate being exhausted when the cause came on for further directions a question arose, *whether the creditors by simple contract were entitled to stand in the place of the specialty creditors in respect of what they had drawn from the personal estate, against the copyhold as well as the freehold estates.*

Mr. Romilly, for the plaintiff, said, that, if the question as against the copyhold estate could be considered open, the principle is, that where a creditor, who has two funds, chooses to resort to the only fund upon which other creditors can go, they shall stand in his place for so much, against the fund to which they otherwise could not have access; but he admitted this case could not be distinguished from *Robinson v. Tonge* (a).

Mr. Pigott, for the coheirresses, relied upon the circumstance that the only act as to the copyhold estate was the covenant for further security to be admitted, and to surrender to the mortgagee, and in the meantime to stand seised in trust for him; showing the intention that the freehold estate should be first applied as the primary fund—the copyhold being only a subsidiary security.

LORD CHANCELLOR ELDON.—The words, “for better securing the payment,” are not thrown in for the purpose of making the freehold estate applicable first; but the common form of a mortgage of freehold and copyhold estates is to make the freehold liable, with a covenant to surrender the copyhold, in order to save the fine.

It is necessary to look into the case that has been cited. Freehold estates are not assets for simple contract debts (b), and I should have thought the same reasoning that governs that case would have applied to this.

Dec. 7, 8, 1802.

Mr. Romilly and Mr. Stratford for the plaintiffs contended upon *Robinson v. Tonge* (c); which they admitted could not be distin-

(a) Stated in Mr. Cox's note, 1 P. W. 101; Shelford, R. P. Statutes, (1802) 680, edit. 5. p. 377.

(b) But see now 3 & 4 Will. 4, c. 16. (c) See the judgment, p. 40.

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gushed from this case, and cited *Lenny v. Athol* (a); *Tipping v. T.* (b); *Lutkins v. Leigh* (c); *Forrester v. Leigh* (d).

Mr. *Pigott* and Mr. *Faulstich* for the defendants, insisted upon *Robinson v. Tonge*.

Mr. *Romilly*, in reply * * * It is objected, that marshalling is merely a distribution of the different assets by such an arrangement as will satisfy all the creditors, and that copyhold estate is not assets. But that which is called *marshalling* is merely that rule with respect to the two funds, stated by Lord *Hardwick* in *Lenny v. Athol*, and is called *marshalling assets*, merely as being generally applied to a case of assets. But the doctrine is applied to other cases, where the parties are living, as the case mentioned in *Lenny v. Athol*, of the two mortgages. So, where the Crown, by an extent, has taken a mortgaged estate, and deprived the mortgagee of his security, the Court of Exchequer has marshalled in his favour by letting him stand in the place of the Crown upon other funds not comprised in his mortgage. Another instance is the case of a surety, who is put in the place of the creditor against the other securities, though he has no charge against them. That is the common equity: *Thet v. T.* (e), and *Dering v. Windchelsea* (f), in which each surety had given a distinct security. The same principle is applied in all these cases * *

LORD CHANCELLOR ELDON.—I cannot yet find this case (g) among Lord *Hardwick*'s notes. I feel it to be my duty to understand the principle of the case before I confirm it, or to decide against it upon a principle stated from this place so clear, that there can be no doubt upon it. I was surprised at the case when it was stated. Suppose there was no freehold estate, but there was a copyhold estate, which the owner had subjected to a mortgage, and died, it is clear the mortgagee, having two funds, might, if he pleased, resort to the copyhold estate. But would this Court compel him to resort to it? If so, the Court marshals by the necessary consequences of its act. If the Court would not compel him, is it not clear that it is purely matter of his will whether the simple contract creditors shall be paid or not?

(a) 2 Atk. 446.

(b) 1 P. W. 729.

(c) Cas. t. Talbot, 51.

(d) Amb. 171.

(e) 2 P. W. 542.

(f) 1 Cox, 318.

(g) *Robinson v. Tonge*, see p. 37, supra, n. (a).

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That, at least, contradicts all the authorities that if a party has two funds (not applying now to assets particularly), a person having an interest in one only has a right in equity to compel the tenant to resort to the other, if that is necessary for the satisfaction of both. I never understood, that if A. has two mortgages, and B. has one, the right of B. to throw A. upon the security which B. cannot touch, depends upon the circumstance whether it is a freehold or a copyhold mortgage. It does not depend upon assets only; a species of marshalling being applied in other cases though technically we do not apply that term except to assets. So, where in bankruptcy the Crown, by extent, laying hold of all the property even against creditors, the Crown has been confined to such property as would leave the securities of incumbrancers effectual (*a*). So in the case of the surety (*b*), it is not by force of the contract; but that equity, upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court placing the surety exactly in the situation of the creditor. So, a surety may have the benefit of a mortgage of a copyhold estate exactly as of freehold. It is very difficult to reconcile this with the principle of all those cases between living persons.

So, also, in a case which this Court calls a just distribution of the effects of a deceased person, a simple contract creditor has no manner of hold upon the freehold estate. How, then, is he allowed in this Court effectually to apply it for his satisfaction? Not upon the ground that it is assets, either by will or by contract inter vivos, but upon the ground, that the specialty or mortgage creditor, having two funds, shall not, by his will, resort to that, by going to which he will disappoint as just a creditor, who cannot resort to any other. *The principle in some degree is, that it shall not depend upon the will of one creditor to disappoint another.* Then, what is the distinction as to the copyhold estate? The question is, whether the debtor has not subjected the copyhold estate to the extent of the mortgage imposed upon it; whether he has not decided that his property to that extent, shall be liable to some debt? And the Court will extract this farther principle, *that a creditor who can reach it is held to that*

(*a*) And see *Sagitary v. Hyde*, 1 Vern. 455. (*b*) See *Dering v. Winchelsea*, post.

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extent, shall not, by his will, defeat another; the former having two funds, the latter only one. The principle is farther demonstrated by the cases of contracts by specialty that do not affect the real estate; as a bond, not mentioning heirs: there, according to Lord *Hardwicke*, there is no marshalling, as there are not two funds, and therefore no one is disappointed by the option of another; the act of the creditor's will necessarily originating out of the security he has. *Robinson v. Tonge*, to a certain degree, relieves simple contract creditors. The estate is charged expressly with the payment of that debt; and therefore, if the freehold and copyhold estates go to different heirs, that change is the foundation for this Court's applying the principle of contribution; not because it is assets, but because it is charged, not being assets. The effect of that, as to simple contract creditors, is, that resort may be given to them upon the unexhausted part of the freehold estate, as the specialty creditors are to a certain degree, thrown upon the copyhold.

Dec. 10.

LORD CHANCELLOR ELDON.—I have looked into every book, and can find nothing material upon this point either in print or manuscript. No book notices that there was any such point in *Robinson v. Tonge*; but it is clear, from the Registrar's book, by the arrangement of the decree, that the point must have occurred. The specialty creditors insisted that they had a right to have the whole copyhold estate applied to the mortgage, in order to leave the freehold estate as assets for debts. Upon that case, if that decision had not been made, I should have thought they would have had that right. I cannot conceive the principle upon which that decision stands. Mr. Cox had it from a book of Lord *Redesdale's*, a note-book of Sir *Thomas Sewell*, who, I have no doubt, took the note himself, and preserved it as a special case. No case, therefore, can be entitled to more respect. The difficulty is this: Suppose the personal estate to be 1500*l.* and simple contract debts to that value, and a mortgage of that amount upon freehold and copyhold estates; the mortgagee, if he pleases, may call for payment out of the estate pledged. It is clear, *if no third persons are concerned* (a), the Court would arrange

(a) As to third parties being concerned, see *Averall v. Wade*, L. & C. C. C. 431. G. t. Sugden, 252; *Barnes v. Raester*, 1 Y. & C. C. C. 431.

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between the two estates, if they went to different persons. In that case, *if no third persons were concerned*, and the estates were of equal value, that sum would be divided between them, and the simple contract creditors would receive the whole personal estate. If the mortgagee chose to exhaust the whole personal estate, the consequence, if that doctrine is right, is, that the simple contract creditors would stand in his place against the freehold estate at least for the proportion of the mortgage that estate ought to bear. Why? That is not the act of the testator, nor of the law. There is no more a lien for them upon the freehold estate than upon the copyhold. But the Court has said, and the principle is repeated very distinctly in *The Attorney-General v. Tindall (a)*, that if a creditor has two funds the interest of the debtor shall not be regarded, but the creditor having two funds, shall take to that which, paying him, will leave another fund for another creditor. If that is so as to simple contract creditors, having no connection with the freehold estate, except that principle of equity, why is not the same principle to apply to copyhold estate? Copyhold estate is not chargeable (b) with debts; neither is freehold estate chargeable with simple contract debts (c); but this copyhold estate is expressly charged with a debt, and if freehold estate is applied to simple contract debts, because charged with another debt, why is not copyhold estate?

April 26, 1803.

LORD CHANCELLOR ELDON—This instrument, as far as it respects the copyhold estate, is certainly an inaccurate security: for the mortgagor, covenanting to procure himself to be admitted and to surrender, and in the meantime to stand seised to the use of the mortgagee, not being himself admitted, could not with propriety be said in the meantime to stand seised, as, after admission, in a sense, he might. The effect of the deed is an agreement in equity pledging the copyhold estate for the payment of that sum together with the freehold estate, and I state it in these terms, as I do not understand it to be an instrument of mortgage of the freehold estate, with no more than a

(a) Amb. 614.

(b) The word "charged" in the report is evidently used by mistake.

(c) But see now 3 & 4 Will. 4, c. 101, rendering freeholds and copyholds liable to all debts.

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covenant that, if the freehold estate should be deficient, the copyhold should be a security in aid; but I look upon it as giving the mortgagee a legal estate in the freehold and an equitable estate in the copyhold; thereby giving him recourse to two funds for the payment of his debt.

The question is, whether, for the sake (if it is necessary) of discharging the debts, and particularly the simple contract debts of the mortgagor, the Court will go farther than it appears to have done in a case which I found, I confess very much to my surprise, in Mr. Cox's note. I never had heard of it before. I do not find, either in print or manuscript, that it has found its way to the notice of the public, except through the channel from which Mr. Cox derived his information. There is no other note of it. Yet there is no doubt of the authenticity of that note; for Mr. Cox has, in this, as in all other cases (which makes his work of so much value in the library of a lawyer), examined the Registrar's book, which corresponds with the note. At the same time, no notice is taken of that case, or any other of that date, in Lord *Hardwicke's* notes. In fact, however, the records of the Court prove that there was such a case. I understand, by the note, that there being no fund but the freehold and copyhold estates, and the mortgage creditor laying both those estates in his mortgage, it was desired that equity, in order to satisfy the specialty creditors, would require him to take his satisfaction out of the copyhold estate alone. The principle stated by the Court, in answer, that copyhold estates are not liable, either in law or equity, to the testator's debts, farther than he subjected them thereto, is undeniably true. But the question is, how it is to be applied, when the testator has, by contract, subjected his copyhold estate to the whole of the debt; though at the same time subjecting an estate of another species also to the whole debt. I understand the opinion of the Court to have been, considering it a due application of the principle stated by Mr. Cox, that none of the rules subject any fund to a claim to which it was not before subject; but they only take care that the election of one claimant shall not prejudice the claims of others: that there were a freehold and copyhold estate both liable to the whole mortgage by the contract and act of the testator in his life; that though the specialty creditors could not be wholly paid, unless the mortgage was thrown upon the copyhold estate, to the intent that the freehold

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might be open to the specialty creditors, yet the copyhold should only bear its proportion; that is, that a value should be set upon each estate; and if that distribution of the two funds left any specialty creditor unpaid, they must abide by the loss. It is quite clear this case is by no means a due application of that principle stated by Mr. Cox. *Both the copyhold and the freehold estates were before subject to the claim; and the converse of that proposition seems in some degree to follow from making the election of the mortgagee determine how far the specialty creditors shall or shall not be paid.*

I have had an opportunity of communicating with Lord *Rodesdale* upon this case, and have his Lordship's authority to say, that he can reconcile it with no principle; that it was as great a surprise upon him as it was upon me, and he considers it as a case standing altogether by itself, and not reconcilable to the principles which govern the Court in a great variety of other instances. I have also the full concurrence of Lord *Rodesdale's* opinion, that he would not determine according to that authority. In the consideration of this subject, the word "assets" has been very frequently used. But when you come to look at the case of *marshalling*, though that term so frequently occurs, *the operation is upon the principle, that the party has a double fund.* It is said copyhold estate is not assets. Clearly it is not assets for specialty debts, not even for the debts of the Crown. But is freehold estate assets for simple contract debts? It is not, neither in law nor equity (a). Upon what ground, then, does the Court say, in given cases, simple contract debts shall be paid out of the real estate? Not upon the ground of assets; but upon this, that, not every creditor has a pledge of land, but a specialty creditor has a double fund to resort to. There may be a mortgage, for instance, where the instrument in none of its parts or obligations would affect the heir. Though he has a pledge of the land, it is not as assets, or as a specialty creditor. But if he has a bond or covenant in the deed, he is a specialty creditor, whose demand after the death of the mortgagor would affect the heir. In that case, then, the Court says, as that specialty creditor, by his specialty contract, can affect the land, he has two funds: the freehold and the personal estate; and he shall not by his election disappoint the natural and

(a) Both freehold and copyhold of all debts. See 3 & 4 Will. 4, c. estates are now assets for the payment 101.

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moral equity of the creditor by simple contract to be paid out of the single fund, which his debt affects. The simple contract creditor, therefore, has no more in law any claim against the freehold estate than the specialty creditor in *Robinson v. Troup* had upon the copyhold estate. But, in the former case, the Court has said, the caprice or election of a bond creditor shall not operate to the prejudice of the simple contract creditor: and how can a due application of that principle be made, if it is not applied where the specialty creditor has a claim against the freehold estate, but not against copyhold estate as any creditor of any sort, but both estates being pledged and made a double fund by the act and deed and contract of the mortgagor?

Suppose another case: two estates mortgaged to A., and one of them mortgaged to B. He has no claim under the deed upon the other estate. It may be so constructed that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say, a person having two funds shall not, by his election, disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him. This has been carried to a great extent in bankruptcy: for a mortgagee, whose interest in the estate was affected by an extent of the Crown, has found his way, even in a question with the general creditors, to this relief; that he was held entitled to stand in the place of the Crown as to those securities, which he could not affect per directum, because the Crown affected those in pledge to him (*a*). Another case may be put: that a man died having no fund but a freehold and a copyhold estate; that they were both comprehended in a mortgage to A., and the freehold estate only was mortgaged to B.; and that B. was not only a mortgagee of the freehold estate, but also a specialty creditor by a covenant or a bond. In that case, as well as in this, it might be said the mortgagee of both estates might, if he thought proper, apply to the freehold estate, and exhaust the whole value of it. The other would then stand as a naked specialty creditor, the fund being taken out of his reach; and there is no doubt that, being both a specialty creditor and a mortgagee of the freehold estate, but

(*a*) And see *Sagittary v. Hyde*, 1 Verr. 455.

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not having any claim as mortgagee upon the copyhold estate, the same arrangement would take place, that he in equity should throw the prior incumbrancer upon the estate to which the other has no resort (*a*).

The cases with respect to creditors and other classes of claimants go exactly the same length. In the cases of legatees against assets descended, a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling; that, if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. That in some measure is upon the doctrine of assets; but with relation to the fact of a double fund. Both are in law liable to the creditors, and therefore by making the option to go against the one, they shall not disappoint another person, who the testator intended should be satisfied. That is not so strong as where it is not bounty, but the party has, by his own act in his life, made liable to the whole debt a copyhold estate, now in law liable, and who, having also a freehold estate, must be understood to mean, that the freehold estate shall be liable according to law to his specialty debts.

The case is exactly the same with reference to the distinction taken, that where lands are specifically devised, the legatees shall not stand in the place of the creditors against the devisees, for that is upon the supposition that there is in the will as strong an inclination of the testator in favour of a specific devisee as a pecuniary legatee, and therefore there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes the case; for there is a double fund; and as, by that denotation of intention, the creditor has a double fund—the land devised, and the personal estate,—he shall not disappoint the legatee (*b*). The case is also the same, where, instead of the case of a mere specialty creditor, the land specifically devised is subject to a mortgage by the testator; as in *Lutkins v. Leigh* (*c*): there he shall not disappoint the legatee. So the case of *paraphernalia* is

(*a*) See *Gwynne v. Edwards*, 2 Russ. & G. 531.
289, n.

(*c*) Cas. t. Talbot, 54.

(*b*) See *Paterson v. Scott*, 1 De G. M.

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very strong for this proposition, that, wherever there is a double fund, though this Court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator.

The conclusion is, that the case of *Robinson v. Tonge* is not reconcilable with the general classes of cases; and therefore, it is necessary for the payment of the creditors, that the mortgagee should be compelled to take his satisfaction out of the copyhold estate, if he takes it out of the freehold, those who are thereby disappointed must stand in his place as to the copyhold estate.

NOTES.

1. Generally.
2. Marshalling in Administration of Assets, p. 48.
3. Marshalling Securities, p. 56.

1. Generally.

The marshalling of assets is such an arrangement of the different funds to be administered as shall enable all the parties having equities thereon to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of such funds *(a)*. It is an application of the principle "*Nemo ex alterius detrimento fieri debet locupletior*," or in the words of *Eldon, C. supra*, *a person having two funds to satisfy his demands, shall not, by his election, disappoint a party who has only one fund*. If, therefore, a person, having a claim upon two funds, chooses to resort to the only fund upon which another has a claim, that other person shall stand in his place for so much against the fund, to which otherwise he could not have access; the object of the Court being, that every claimant shall be satisfied, as far as, by any arrangement consistent with the nature of the several claims, the property which they seek to affect can be applied in satisfaction of such claims *(b)*.

Marshalling will not unless founded on some equity, be enforced between persons, unless they are creditors of the same person, and have demands against funds the property of the same person. "It

(a) *Story, Eq.* (1892) p. 367; *Lanoy v. Athol*, 2 Atk. 444; *Re Cornwall*, 3 Dr. & War. 173; *A.-G. v. Tyndall*, Amb. 614; *Hanby v. Roberts*, Amb.

127; *Tombs v. Roch*, 2 Coll. Ch. R. 497; *Tidd v. Lister*, 10 Ha. 157.

(b) *Ex p. Kendall*, 17 V. 520.

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was never said," observed Lord *Eldon*, "that if I have a demand against A. and B, a creditor of B. shall compel me to go against A. without more; as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor or principal and surety, to the intent that all the obligations arising out of these complicated relations may be satisfied; but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity giving B. the right, for his own sake, to compel me to seek payment from A." (a).

The doctrine, moreover, is not applicable unless there are two funds already in existence before the question relating to it is raised (b). It is in effect no more than this, that where one person has a clear right to resort to two funds, and another person has a right to resort to one only of two funds, the latter may say that as between himself and the double creditor, that double creditor shall be first to exhaust the security upon which the single creditor (if I may so call him) has no claim (c). And there must be two funds to which the person against whom the doctrine is sought to be established can resort upon an equal footing (d).

It is, moreover, essential to the application of the doctrine of marshalling, not only that there should be two creditors of the same person, but that one of them should have two funds *resortable to the same person* to which he can resort. Thus, it has been held in Ireland that a legatee in a will of a tenant in tail of land has no right to throw judgment creditors of the testator, whose judgments attach on the land under the statute 3 & 4 Vict. c. 108, s. 22, exclusively on those lands, which are the lands of the heir, in exoneration of the testator's general assets (e). For the doctrine will not be applied to the prejudice of third parties. Nor does it apply as between mere volunteers (f). But the Court will not interfere actively against them by marshalling in favour of a creditor (g).

(a) *Ex p. Kendall*, 17 V. 520; *Boane v. Cox*, 6 B. 84; *Sneed v. Culpepper*, 2 Eq. Ca. Abr. 253, 260.

(b) *Re Professional L. A. Co.*, 3 Eq. 668; *Re State F. I. Co.*, 1 De G. J. & S. 634; *Re International L. A. Soc.*, 2 C. D. 476.

(c) Per Lord *Westbury*, *Dolphin v. Aylward*, 4 L. R. H. L. 486, 505.

(d) *Webb v. Smith*, p. 66, *infra*.

(e) *Douglas v. Cooksey*, 2 Ir. R. Eq.

311; *Pleasant v. Buchanan*, 3 De G. M. & G. 976; *Re International L. A. Soc.*, 2 C. D. 476.

(f) *Bozeman v. Johnson*, 8 S. 377, but see *Lomas v. Wright*, 2 My. & K. 769.

(g) *Dolphin v. Aylward*, 4 L. R. H. L. 486, 502; and see further as to volunteers, *Hales v. Cox*, 32 B. 118; p. 59, *infra*.

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2. Marshalling in Administration of Assets.

Between Creditors.—The Act of 3 & 4 W. 4, c. 104, which makes freeholds and copyholds liable to simple contract debts, and the Act 32 & 33 Vict. c. 46, which places the simple contract debt of persons dying on or after January 1, 1870, on an equal footing with their specialty debt, has rendered the doctrine of marshalling, as between creditors, of but little importance. The rule acted upon was that as creditors by simple contract had no claim upon real assets, unless charged with, or devised for, the payment of debts, a Court of Equity would compel *specialty creditors* who might resort, in the first instance, to the personal estate, in priority of *simple contract creditors*, and to the real assets, in exclusion of them, to recover satisfaction, in the first place out of the real assets as far as they went: or, if the specialty creditors had already exhausted the personal assets in payment of their claims, the *simple contract creditors* would be put to stand in their place against the real assets, whether devised or descended, as far as the specialty creditors might have exhausted the personal assets (*a*). And a specialty creditor, to whose debt copyholds, previous to 3 & 4 Will. 4, c. 104, were not liable, might stand in the place of a mortgagee of the copyholds who was paid out of the personal estate (*b*). As to the effect of the Statute of Limitations upon the right to marshal (*c*).

Mortgages.—The principle upon which the Courts act in cases of marshalling was departed from in the case of a mortgagee, in the administration of the assets of a deceased mortgagor in Chancery. There, it might have been supposed, that a mortgagee having two funds, viz., the mortgaged estate and the general assets, would as against the general creditors only have been allowed to prove against the latter fund for so much of the debt as the mortgaged estate was deficient to pay—and this was so decided by *Leach*, M. R., in *Greenwood v. Taylor* (*d*), following the rule of bankruptcy in such cases. *Cotton*, C., however, in *Mason v. Bogg* (*e*), overruling the case of *Greenwood v. Taylor*, held that in an administration suit a mortgagee might prove his whole debt and afterwards realise his security

(*a*) *Sagitary v. Hyde*, 1 Vern. 455; *Wilson v. Fielding*, 2 Vern. 763; *Galton v. Hancock*, 2 Atk. 436; *Tombs v. Roch*, 2 Coll. Ch. R. 499; *Lomas v. Wright*, 2 My. & K. 769; *Cradock v. Piper*, 15 Si. 301.

(*b*) *Gwynne v. Edwards*, 2 Russ. 289,

n.; *Greenwood v. Taylor*, 1 Russ. & M. 187.

(*c*) See *Fontham v. Wallis*, 10 Ha. 230; *Busby v. Seymour*, 1 Jo. & Lat. 527.

(*d*) 1 Russ. & M. 185.

(*e*) 2 My. & C. 448.

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for the deficiency, and the same rule was followed when a company was being wound up under the Companies Act 1862 and a creditor holding security was entitled to prove for the whole amount that was due to him, and not merely, as in bankruptcy, for the balance remaining due, after realising or valuing his security.

Recent legislation, has, however, both in the administration of the estate of a deceased person whose estate is insolvent, and in the winding up of companies adopted the rule of bankruptcy followed in *Greenwood v. Taylor* (a).

Between Legatees.—Where a testator has charged one or more legacies upon the real estate, and other legacies are not so charged, if the personal estate prove insufficient to pay them all, the *legacies charged on the real estate* shall be paid thereout; or if they have been paid out of the personal estate, the other legacies, as to so much, shall stand in their place as a charge upon the land (b).

But where the charge of a legacy upon real estate fails to affect it, in consequence of an event happening subsequent to the death of the testator, as the *death of the legatee before the time of payment*, the Court will not marshal assets so as to turn such legacy upon the personal estate, in which case it might be vested and transmissible, whereas, as against the real estate, it would sink by the death of the legatee (c). In *Pearce v. Loman* (d), a legacy charged upon real estate and payable at a future day, was held by Lord Roslyn to sink as to the real estate by the death of the legatee, before the time of payment; and that the assets could not be marshalled. "There is a singularity," observes his Lordship, "in the doctrine, as it now stands, that, as far as it affects one fund it is good: as far as it affects the other, bad; but it would be still more singular if it shall sink in one case, and not in the other, but the land, making good the personal estate, shall be charged * * * The assets cannot be marshalled. It would be directly against *Prowse v. Abingdon*; the contingency is the same; and *I cannot charge the real estate indirectly*" (e).

Where the legal order of the assets has been deranged.—If a creditor resort to the assets for payment out of the order prescribed

(a) See the Judicature Act, 1875, s. 10; Annual Practice, Part I.

(b) *Hauby v. Roberts*, Amb. 127; *Masters v. M.*, 1 P. W. 421; *Bligh v. Darnley*, 2 P. W. 619; *Bonner v. B.*, 13 V. 379; *Hauby v. Fisher*, 2 Coll. Ch. R. 315; *Re Stokes*, 67 L. T. 223; *Re Salt*, (1895) 2 Ch. 203; *Re Bate*,

cited *supra*, p. 32 (n.); *Scales v. Collins*, 9 Ha. 656; *Sellon v. Watts*, 9 W. R. 817; *Sellon*, 1893, p. 1104, F. 9.

(c) *Prowse v. Abingdon*, 1 Atk. 182.

(d) 3 V. 155.

(e) *Jarmyn*, 18 vol. 1, p. 792, and vol. 2, p. 1439; *Tombs v. Rich*, 2 Coll. Ch. R. 591.

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by law (see p. 32, *supra*), his election is not allowed to prejudice the beneficiaries. "One rule of marshalling assets," observes Lord *Hartwick*, "is clear, if there are debts by specialty and legacies, and no devise of the real estate, but it descends: if the creditors exhaust the personal estate, the legatees may stand in their place, and come upon the real estate; this is against the heir-at-law" (a). "For although," as observed by Lord *Alldon*, in the principal case, "in the case of legatees against assets descended, a legatee has not so strong a claim to this species of equity as a creditor, the mere bounty of the testator enables the legatee to call for this species of marshalling; that, if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not (b)."

The doctrine of marshalling in favour of legatees against heirs is part of the *lex loci*, and does not apply when the lands are situated in Scotland (c).

"If one *devisees* real estate, and gives general pecuniary legacies *not charged on* that real estate, and the creditors exhaust the personal estate the legatees shall not stand in their place and come on the realty, because it was the intention of the testator that the devisee should have the real estate, as well as the legatees be paid" (d). But otherwise if the debts are charged upon the real estate (e).

Nor will a specific legatee be allowed to stand in the place of specialty creditors as against real estate devised (f); although, since 3 & 4 Will. 4, c. 106, the devisee be the heir (g); and it is now settled that a devisee and a specific legatee shall contribute *pro rata* to satisfy the debts of the testator which his general personal estate is insufficient to pay (h).

Previous to the Wills Act, a pecuniary legatee was not entitled to stand in the place of a creditor who had exhausted the personal assets as against a residuary devisee, upon the ground that previous

(a) *Hanby v. Roberts*, Amb. 128.

(b) *Culpepper v. Ashton*, 2 Ch. Ca. 117; *Tipping v. T.*, 1 P. W. 730; *Lacy v. Gardener*, Bunb. 137; *Lutkins v. Leigh*, Cas. t. Talbot, 34; *Bowman v. Reeve*, Pr. Ch. 557.

(c) *Harrison v. H.*, 8 Ch. 342, 348.

(d) *Hanby v. Roberts*, Amb. 128; *Scott v. S.*, Amb. 383; *Marchouse v. Sciffe*, 2 My. & C. 695; *Keeling v. Brown*, 3 V. 359.

(e) *Re Salt*, (1895) 2 Ch. 203.

(f) *Haslewood v. Pope*, 3 P. W. 324, 5th Resolution.

(g) *Strickland v. S.*, 10 Si. 374.

(h) *Long v. Short*, 1 P. W. 493; see *Re Saunders-Davies*, 34 C. D. 382; *Re Bowden*, (1894) 1 Ch. 693; *Re Butler* p. 61, ante; *Young v. Hassard*, 1 J. & Lat. 466; *Tombs v. Roch*, 2 Coll. Ch. R. 430; *Dugdale v. D.*, 14 Eq. 231.

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to the Wills Act every residuary devise was in reality specific as it only comprehended property of which the testator was seized at the time of making his will (*a*); and a residuary devise of real estate remains specific, notwithstanding the 24th section of the Wills Act; and a pecuniary legatee has consequently no right to marshal assets as against residuary devisees where the land is *not* charged with debts (*b*), or with legacies (*c*).

In *Hensman v. Fryer* (*d*), *Chelmsford*, C., although he rightly decided that a residuary devise is none the less specific since the passing of the Wills Act, and that consequently pecuniary legatees had no more right to marshal as against residuary devisees than they had before the Act, nevertheless, apparently by some mistake, held that residuary devisees were bound to contribute *rateably* with the pecuniary legatees to pay such debts as the general personal estate was insufficient to satisfy. But in *Collins v. Lewis* (*e*), *Stuart*, V.-C., stating it to be the settled law of the Court that personal estate not specifically bequeathed must be first applied in payment of debts before the real estate which passes under a residuary devise can be resorted to, declined to follow *Hensman v. Fryer* (*f*) on this point.

Although, as we have before observed, a legatee is not entitled to stand in the place of a specialty creditor, as against real assets devised, nevertheless in cases not coming within the Real Estate Charges Acts (*supra*, p. 24), where a mortgage of a devise, as well as of a descended estate, has exhausted the personal assets by resorting to them in the first instance, a legatee [*?* specific or pecuniary] may stand in his place, and be satisfied out of the mortgaged premises, to the extent of the personalty applied in their exoneration; for the application of the personal assets in exoneration of the real estate mortgaged, does not take place so as to defeat any legacy (*g*).

(*a*) *Spong v. S.*, 1 Y. & J. 300, 311; *Muchous v. Seafe*, 2 My. & C. 695.

(*b*) *Pearmain v. Twiss*, 2 Gif. 130; *Hensman v. Fryer*, 3 Ch. 420; *Gibbins v. Eyden*, 7 Eq. 371; *Collins v. Lewis*, 8 Eq. 708; *Lancefield v. Iggulden*, 10 Ch. 156; *Dady v. Hartridge*, 1 Dr. & Sm. 256; *Cogswell v. Armstrong*, 2 Kay & J. 227; *Barnwell v. Ironmonger*, 1 Dr. & Sm. 242; *Redbourn v. Mold*, 13 W. R. 851; *Rotherham v. R.*, 26 B. 465; *Re Salt*, (1895) 2 Ch. 205.

(*c*) *Greville v. Brown*, 7 H. L. Cas.

689; *Raikes v. Boulton*, 29 B. 41; *Re Saunders-Davies*, 31 C. D. 382; *Re Bawden*, (1894) 1 Ch. 693.

(*d*) 3 Ch. 420.

8 Eq. 708.

(*f*) See also *Parquharson v. Floyer*, 3 C. D. 103.

(*g*) See (*e*) *supra*; *Forrest v. Forster*, Amb. 171; *Lutkins v. Lutkins*, 1 Talbot, 53; *Middleton v. M.*, 1 P. 200; *Wythe v. Henniker*, 2 My. & K. 655; *Johnson v. Child*, 4 H. 87.

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Notwithstanding the doubt expressed in *Mackreth v. Symmons*, by *Eldon*, C. (see post), and in other cases as to whether, on the death of a purchaser without having paid his purchase money, the Court would marshal his assets in favour of third parties, it was settled before 40 & 41 Vict. c. 34 (which see p. 31, supra), that where a purchaser of real estate died intestate as to such estate, but having bequeathed legacies by his will, as the vendor had two funds to resort to, viz., his lien upon the land descended and the general personal estate, the pecuniary legatees might stand in his place upon the descended land if the vendor resorted to the personality in the first instance (a). And it is settled, notwithstanding *Wythe v. Henninger* (b), that pecuniary legatees had the same right to stand in the place of the vendor with respect to his lien for unpaid purchase money on estates devised by the purchaser, in case the vendor resorted in the first instance to the personal estate. In *Birds v. Askey* (c) a trustee advanced to A. B., one of his cestuis que trustent, a part of the trust funds, to enable him to purchase a real estate. A. B. died without having repaid the money, having devised the estate, and his personal estate was insufficient to pay his debts and legacies. *Romilly*, M. R., held, first, that there was a lien on the estate for the trust funds: and, secondly, that the pecuniary legatees had, as against the devisees, a right of marshalling so as to have the lien satisfied primarily out of the purchased estate (d).

Lands devised in trust to pay debts being applicable before pecuniary or specific legacies (e) will be marshalled in favour of legatees or annuitants (f).

Where lands are devised charged with debt it seems they were marshalled in favour of legacies (g). In *Foster v. Cooke* (h) lands were devised charged with debts, and the assets were marshalled in favour of pecuniary and specific legatees (i). But this was

(a) *Trimmer v. Bayne*, 9 V. 209; *Spoule v. Prior*, 8 Si. 189.

(b) 2 My. & K. 635.

(c) 24 B. 618.

(d) See also *Lilford v. Powys-Keek*, 1 Eq. 317. But see now 30 & 31 Vict. c. 69, s. 2, and 40 & 41 Vict. c. 34, pp. 30 and 31, supra.

(e) p. 32, supra.

(f) *Bradford v. Foley*, 3 Bro. Ch. 351, n.; *Webster v. Alsop*, 3 Bro. Ch. 352, n.; *Norman v. Morrell*, 4 V. 769;

Surtees v. Parkin, 19 B. 406; *Hanby v. Fisher*, 2 Coll. Ch. R. 515; *Buckley v. B.*, 19 L. R. Ir. 544; *Paterson v. Scott*, 1 De G. M. & G. 531; *Seton*, 1893, p. 1398, F. 1, Doc. 981, 4th edit.

(g) *Re Salt*, (1895) 2 Ch. 203; *Seton*, 1893, p. 1402, F. 7.

(h) 3 Bro. Ch. 347.

(i) And see *Richard v. Barrett*, 3 Kay & J. 289; *Greville v. Brown*, 7 H. L. Cas. 689; *Re Bawden*, (1894) 1 Ch. 693.

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because lands so charged were then held applicable before *paraphernalia* legacies (*a*). See, however, the order of assets now stated at p. 32, ante (*b*).

As to lands descended. As simple contract creditors have now, under 3 & 4 Will. 4, c. 104, a right to demand payment of their debts out of the real estate of the deceased debtor, and have therefore a double fund out of which they may receive satisfaction, it follows on principle, that if they exhaust the personal assets, the legatees may stand in their place as to the real estate descended. In a case, however, before *Knight Bruce, V.-C.*, it was argued that the stats. 3 Will. & M. c. 14, and 3 & 4 Will. 4, c. 104, were intended for the relief of creditors, and not of legatees, but his Honor was clearly in favour of marshalling for the legatees in such a case. "The equity of marshalling," he observes, "arises from a creditor's power to resort not from the mode in which he acquired the power of resorting to each or either of two funds belonging to the debtor, whose rights, subject to the debt, have become divided. * * * I have dwelt the more upon this argument, grounded on the nature and effect of statutory liability to debts, because, if it is well founded it seems in substance not to stop short of asserting that, inasmuch as it is by statute that copyholds are assets for creditors, and freeholds for simple contract creditors, therefore there cannot be marshalling for legatees against descended copyholds, or in respect of simple contract debts against descended freeholds; it will surprise me exceedingly to hear of such a doctrine having met, or meeting with support, or acceptance" (*c*).

Widow's paraphernalia.—Although, with the exception of necessary wearing apparel (*d*) a widow's paraphernalia are liable to her deceased husband's debts, she will be preferred to a general legatee and be entitled, therefore, to marshal assets in all those cases in which a general legatee would be entitled to do so; for instance, as against real assets descended (*e*), or real assets devised, if subjected by will to the payment of debts (*f*), and if a devised estate be subject to a mortgage or other specific incumbrance, she will, in cases not

(*a*) Jarman, 1893, p. 1494.

(*b*) See also *Re Bate*; *Re Butler, &c.*, there cited, and cf. *Hanby v. Fisher*, 2 Coll. Ch. R. 515; *Sellon v. Watts*, 9 W. R. 847; *Seton*, 1893, p. 1404.

(*c*) *Tombs v. Roch*, 2 Coll. Ch. R. 490.

(*d*) 2 V. 7.

(*e*) *Tipping v. T.*, 1 P. W. 730, cited p. 61, *infra*; *Tynt v. T.*, 2 P. W. 343; *Probert v. Chifford*, Amb. 6; *Snelson v. Corbet*, 3 Atk. 368.

(*f*) *Incedon v. Northcote*, 3 Atk. 438; *Boynton v. Parkhurst*, 1 Bro. Ch. 376.

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coming within the Real Estate Charges Acts (*supra*, p. 23), be entitled to marshal the assets as against the devisee, by throwing the charge upon the estate, as the legatee would have that right (*a*); but it seems to have been thought that she could not marshal against an estate devised if it were neither subjected by will to payment of debts, nor subject to a mortgage or specific incumbrance (*b*). But it seems now that the same claims on the part of the widow would prevail against specific devisees (*c*) as well as specific legatees (*d*).

Charity.—*Assets not marshalled for Charities.*—As a general rule assets are never marshalled in favour of legacies given to charities upon the ground, as stated by Lord *Hardwicke*, in *Mogg v. Hodges* (*e*) that the Courts are not warranted in setting up a rule of equity merely to support a bequest which is contrary to law. Thus, if a testator gave his real estate and personal estate, consisting of personalty savouring of realty, as leaseholds and mortgage securities, and also pure personalty, to trustees, upon trust to sell, and pay his debts and legacies, and bequeathed the *residue* to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate, and the personalty savouring of the realty, in order to leave the pure personalty for the charity (*f*).

If a simple pecuniary legacy was given to a charity out of two sorts of personalty, there was an abatement in the proportion of the mixed to the pure personalty (*g*). “The rule of the Court adopted in all such cases is, to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies; then holding so much of the charity legacies to fail as would, in that way, be to be paid out of

(*a*) *Oneal v. Mead*, 1 P. W. 693; *Lutkins v. Leigh*, Cas. t. Talbot, 53.

(*b*) *Ridout v. Plymouth*, 2 Atk. 104; *Probert v. Clifford*, 4 P. W. 545, n.; *Forrester v. Leigh*, Amb. 172.

(*c*) *Tombs v. Roch*, 2 Coll. Ch. R. 190; *Gervie v. G.*, 14 Si. 651.

(*d*) *Graham v. Londonderry*, 2 Atk. 78; 3 Atk. 395, 369, but see *Burton v. Pierpoint*, 2 P. W. 79; and as to paraphernalia generally, see *Hulme v. Tenant*, *post*.

(*e*) 2 V. 53.

(*f*) *Mogg v. Hodges*, *supra*; A.-G. v. Tyndall, 2 Eden, 207; *Foster v. Blagden*, Amb. 701; *Middleton v.*

Spicer, 1 Bro. Ch. 201; A.-G. v. Winchelsea, 3 Bro. Ch. 273; *Makeham v. Hooper*, 4 Bro. Ch. 153; *Crosbie v. Mayor of Liverpool*, 1 Russ. & M. 761, n.; *Fowdrie v. Gowdey*, 3 My. & K. 397; *Johnson v. Woods*, 2 B. 409; *Gaskin v. Rogers*, 2 Eq. 284; *Wigg v. Nicholl*, 14 Eq. 92; *Brook v. Badley*, 3 Ch. 675; *Re Watts*, 29 C. D. 947.

(*g*) *Ridges v. Morrison*, 1 Cox, 180; *Walker v. Childs*, Amb. 524; A.-G. v. Tyndall, 2 Eden, 207; *Foster v. Blagden*, Amb. 704; *Makeham v. Hooper*, 4 Bro. Ch. 153; *Hobson v. Blackburn*, 1 Keen, 273.

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the prohibited fund (a). This apportionment should be made according to the respective values of the pure and impure personality at the testator's death (b). In a singular case, where executors were directed to purchase a presentation to Christ's Hospital, the result of the rule against marshalling assets for a charity was that the bequest failed altogether, there not being sufficient money from the pure personality alone to effect the purchase (c).

But although the Courts will not marshal assets for charitable legacies, a testator may in effect himself marshal or arrange his assets, by directing his charitable legacies to be paid exclusively out of his pure personality, and the Courts will, as it is not illegal, give effect to his intention (d); and a bequest of a residue of personal estate which included impure personality to trustees upon trust to divide the same among such charities in England as they should think proper, was held equivalent to a direction to the trustees in effect to marshal the residue (e).

Where a testator has charged his real estate with payment of his debts, and has directed his charity legacies to be paid out of his pure personality, the charity legatees will have a right to stand in the place of creditors who may have exhausted the pure personality, inasmuch as it is not the Court, but the testator who in such cases marshals the assets (f).

Although the testator may have directed his charitable legacies to be paid out of his pure personality in priority of other legacies, if he has given no direction as to the funds out of which his debts and funeral and testamentary expenses are to be paid, the pure personal estate must contribute with the other personal estate to their

(a) Per *Cottenham, C.*, in *Williams v. Kershaw*, 1 Keen, 276, n., followed *Ashworth v. Munn*, 31 C. D. 391; see also *Waite v. Webb*, 6 Madd. 71; *Johnson v. Harrowby*, John. 425; *Jauncy v. The A.-G.*, 3 Gif. 308; *Scott v. Forristall*, 13 W. R. 37; *Philanthropic Soc. v. Kemp*, 4 B. 381; *Re Hills T.*, 16 C. D. 173; *Re Clark*, 33 W. R. 516; *Seton*, 1893, p. 1130, F. 15.

(b) *Calvert v. Armitage*, 1 Hem. & M. 446, overruling on this point *Robinson v. Governors of London Hospital*, 10 Ha. 19.

(c) *Cherry v. Mott*, 1 My. & C. 123.

(d) *Robinson v. Goldard*, 3 Mac. & G. 755; *Nickerson v. Crompton*, 3 D. G. J. & S. 622; *Wigg v. Naylor*, 14 Eq. 92; *Miles v. Harrison*, 9 C. D. 316; *Wills v. Bourne*, 16 Eq. 487; *Re Arnold*, 37 C. D. 637; *Re Pitt*, 53 L. T. 113; *Seton*, 1893, p. 1134, F. 18.

(e) *Lewis v. Allen*, 10 L. R. 668, and see *Re Ovey*, 31 C. D. 113; cf. *Re Somers-Cocks*, (1895) 449.

(f) *A.-G. v. Mountmorris*, 1 Dick. 379; *Re Ovey*, supra; *Biggar v. Eastwood*, 19 L. R. 49.

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payment, before it can be applied in satisfaction of the charitable legacies (*a*).

But the testator may exonerate his pure personality from debts, which he may throw either expressly or by implication upon some other fund as the realty, or impure personality in default of realty (*b*), and although the testator may exonerate the pure personality from debts it must bear its share of the costs of administration unless they are otherwise provided for by the testator (*c*).

It seems that the rule in England which will not allow marshalling in favour of legacies, even to charities, is not applicable to Scotland (*d*).

Mortmain and Charitable Uses Act, 1891.—This Act provides that land assured by will for a charitable purpose shall be sold within one year from the testator's death, s. 5, and that personal estate directed by will to be laid out in land shall not be so laid out, but shall go to the charity as if there had been no such direction, s. 7.

The Act which passed 5th Aug., 1891, is only to apply to the will of a testator dying after that date, s. 9. This means that the Act shall apply to the will of a testator dying after the passing although made long before (*e*). The testator in this case by his will, dated June, 1891, gave real and pure and impure personality upon trust for his wife for life, and on her death the residuary estate which might by law be given to charitable purposes, to a hospital. The entire residue was held to pass. Since this Act the necessity of inserting in wills containing charitable gifts any direction for the marshalling of testator's property is done away with (*f*).

3. Marshalling Securities.

The doctrine of *marshalling* is not confined to the administration of assets, but is applied to many other cases, where the parties are living. A case for marshalling need not be made by the pleadings (*g*).

Mortgages. If a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, with or without notice of the first, the Court, in order to relieve the second mortgagee, directs the first to take his satisfaction out of

(*a*) *Tempest v. T.*, 7 De G. M. & G. 470; *Beaumont v. Oliveira*, 4 Ch. 309; *Lewis v. Boetefour*, 38 L. T. N. S. 93.

(*b*) *Wills v. Bourne*, 16 Eq. 487; *Miles v. Harrison*, 9 Ch. 316.

(*c*) *Re Fitzgerald*, 20 W. R. 53.

(*d*) *Macdonald v. M.*, 14 Eq. 60.

(*e*) *Re Bridger*, (1893) 1 Ch. 44.

(*f*) *Jarman, Wills* (1893), p. 1694.

(*g*) *Gibbs v. Ongier*, 12 V. 416; 8 R. R. 348; and see *Judicature Act*, 1873, s. 24 (4).

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that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons: see the judgment of *Hardwicke, C.* in *Lanoy v. Athol* (a).

But the right of a second mortgagee of one of the estates mortgaged to marshal, that is to throw the prior charge which exists on both estates, upon that which is not mortgaged to him—is an equity which is not enforced against *third parties*, that is against any one except the mortgagor and his legal representatives claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estates. If both estates are subject to separate second mortgages the Court apportions the first mortgage between them: per *Kay, L. J.*, in *Flint v. Howard* (p. 58, *infra*).

Thus the Court will not marshal in favour of a second against a third mortgagee. In other words, if Blackacre and Whiteacre are mortgaged first to A., and then Blackacre to B., and then both to C., there will be no marshalling between B. and C., but A. will be paid rateably out of both, so that B. may be paid out of Blackacre leaving what remains of both for C. In *Burnes v. Roester* (b), R. being seized of Foxhall Coppice, and a piece of land marked in a plan of the estate No. 32, mortgaged, in 1792, Foxhall to B.; in 1795, Foxhall to H.; in 1800, Foxhall and No. 32 to B., and in 1804, Foxhall and No. 32 to W.; the subsequent incumbrancers took with notice. It was held, by *Knight-Bruce, V.-C.*, that the Court ought not, as against W., to marshal the securities. His Honour said, that, circumstanced as the case was, H. and W. stood, with regard to the matter in dispute, on an equal footing: that B. ought to be paid out of the respective proceeds of No. 32, and Foxhall, pari passu and rateably, according to their amounts; that the residue of the proceeds of Foxhall ought to be applied towards paying H. and that the residue of the produce of No. 32 ought to be applied towards paying W. In *Bayden v. Bignold* (c), C. claimed, on the ground that he had no notice of the mortgage to A., to throw the whole of it upon the estate mortgaged to B. It was held that although he had no notice he could not do this, but because he had no notice B. could not insist on a similar right against him. In *Gibson v. Seagrims* (d), *Romilly, M. R.*, held that if two estates

(a) 2 Atk. 446; *Tidd v. Lister*, 3 De G. M. & G. 857; and p. 58 *infra*, note (d).

(b) 1 Y. & C. C. C. 401.

(c) 2 Y. & C. C. C. 577.

(d) 20 B. 614.

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are mortgaged to A. and then one of them to B. and the other to C., B. has no equity to throw the whole of A's mortgage on C's estate and so destroy C's security. But, as between B. and C., A. must take his principal interest and cost out of the two estates rateably (a).

In *Flint v. Howard* (b), P. in 1876, mortgaged a paper mill, and a reversion to H. to secure 6000*l.* In 1882 he mortgaged the same properties to F. to secure 5000*l.* In 1884 he mortgaged the paper mill to F. to secure 2500*l.* In 1885, by a deed between F., P. and H. the mortgage to F. on the paper mill for 2500*l.* was transferred to H., and the paper mill was released from the mortgage of 5000*l.* to F. Therefore, in 1885, H. was first and second mortgagee of the paper mill, and first mortgagee of the reversion, and F. was second mortgagee of the reversion. P. made subsequent mortgages of both properties. F. foreclosed all mortgages on the reversion subsequent to his own, and then brought an action claiming to redeem H.'s mortgage on the reversion on payment of 6000*l.* (c), and to have a transfer of the paper mill. Held that such 6000 must be apportioned between the paper mill and the reversion according to their respective values, and that F. was entitled to a conveyance of the reversion absolutely, and of the paper mill as a security for such part of the 6000 as should be apportioned to that property. H. therefore as second mortgagee of the paper mill would have a right to redeem F. on payment of the sum so apportioned (d).

But if a third mortgagee, by his mortgage, takes expressly, *subject to and after payment of the first two mortgages*, the second mortgagee will be entitled to marshal as against the third. Thus in *Re Mower's Tr.* (e), a mortgagor being entitled in reversion to funds A. and B., made three mortgages. The first mortgage included A. and B., the second mortgage included B. only, and the third mortgage included A. and B., but was made *subject to, and after payment of the two former mortgages*. Fund A. was absorbed in payment of

(a) And see *Moxon v. Berkeley* B. S., 69 L. T. 250.

(b) 1893 2 Ch. 51.

(c) See *Mutual L. S. v. Langley*, 32 C. D. 460.

(d) See further *Stronge v. Hawkes*, 4 De G. & J. 632; *Avenall v. Wade*, L. & G. 1. Sugden, 252; *Lanoy v. Athol*, 2 Atk. 444; *Baldwin v. Belcher*, 3 Dr. & War. 176; *Hughes v.*

Williams, 3 Mac & G. 690; *Re Cornwall*, 3 Dr. & War. 173; *Re Fox*, 5 Ir. Ch. R. 541; *Gibson v. Seagrims*, 20 B. 614; *Re Lawder's Estate*, 11 Ir. Ch. R. 346; *Re Rooke's Estate*, 15 Ir. Ch. R. 316; *Dolphin v. Aylward*, 4 H. L. Cas. 436; *Trumper v. T.*, 8 Ch. 870.

(e) 8 Eq. 110.

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the first mortgage. It was held by *Romilly, M. R.*, that the second mortgagee was entitled to marshal as against the third by standing in the place of the first mortgagee as against fund B. (a).

The doctrine of marshalling will not be applicable to the *prejudice of volunteers* where one of the estates has been conveyed away by a voluntary settlement (b). But estates comprised in one mortgage will be marshalled in favour of a voluntary settlement, so as to throw the debt on the unsettled estates. Thus, in *Hales v. Cur* (c), A. B. executed a voluntary settlement of real estates to uses in favour of his four children, and *he covenanted* that the estate should remain to those uses and for quiet enjoyment. A. B. afterwards mortgaged the settled estate with his own unsettled estates, and died. It was held by *Romilly, M. R.*, that the children were entitled to throw the mortgages on the unsettled estate, and as against the legatees to prove under the covenants against the settlor's assets for the damage they had sustained by the mortgage. "It is clear," said his Honour, "that the persons who take under the voluntary settlement would, as regards the subsequent mortgages, not only take the property subject to those mortgages, but the mortgages ought, by marshalling, to be thrown as much as possible on the unsettled property, so as to liberate the settled property from the mortgage. If, by these means, the settled property will not be altogether freed from the mortgages, then I think that the persons who are entitled to the benefit of the covenants for quiet enjoyment contained in the settlement have a right to prove against the assets of the settlor for the amount to which they have been damaged by reason of his subsequently mortgaging the settled property: that is, after providing for the testator's debts, they are entitled to priority over the legatees (d).

Marshalling also will take place in favour of an incumbrancer whose charge is only voluntary (e). But volunteers have no right to marshal to the prejudice of a prior settlement (f).

Where the owner of two estates charged with debts, mortgages one of them, and recites in the mortgage deed by mistake, *that his debts are paid*, and covenants against incumbrances, the creditors having

(a) See also *Re Roddy*, 11 Ir. Ch. R. 369. and the remarks on this case by *Christian, L. J.*, in *Ker v. K.*, 4 Ir. R. Eq. 15.

(b) *Dolphin v. Aylward*, 4 L. R. H. L. 502.

(c) 32 B. 118.

(d) See *Seton*, 1893, p. 1740, F. 3; 769.

(e) *Aldridge v. Forbes*, 1 Jur. 20.

(f) *Anstey v. Newman*, 29 L. J. Ch.

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two funds to resort to viz, the mortgaged and unmortgaged estate, will be thrown upon the other estate (*a*). And the result has been the same when a mortgagor settling *potest* of mortgaged estates covenants to exonerate them from incumbrances, the tenant under the settlement in tail, would be entitled to throw the mortgage upon the unsettled estates, not only as against the settlor and against the assignee in bankruptcy but also as against subsequent judgment creditors (*b*), but not, it seems against a subsequent incumbrancer being an assignee for value without notice (*c*).

Where, however, the mortgagees are appointees under a power, there can be no marshalling against the later incumbrancer any more than there would be against the persons who have taken in default of appointment (*d*).

Nor will the doctrine of marshalling be applied in favour of a subsequent mortgagor as against intermediate volunteers, in favour of whom one of the estates subject to a mortgage has been conveyed. Suppose, for instance, A. mortgaged Blackacre and Whiteacre to B., and then made a voluntary settlement of Whiteacre, and afterwards mortgaged Blackacre to C., the doctrine of marshalling would not be applied in favour of C. by compelling B. to have recourse to Whiteacre alone so as to leave Blackacre free (*e*).

If one of two estates in mortgage is subject to a *portion*, the person entitled to the portion may, if it be necessary, compel the mortgagee to resort to the other estate, so that the payment of the portion as well as the mortgage may be worked out (*f*).

So where a jointure is a charge upon two estates, and a portion upon one of them only, the portioner can compel the jointress to resort to the other estate. In *Lanoy v. Athol* (*g*), Lanoy created, by marriage settlement, a charge of 500*l.* a year upon real estate as a jointure for his wife, afterwards Duchess of Athol, and there was a covenant for the payment thereof. Under a post-nuptial settlement by Lanoy of his real estate, there was a term of 200 years created to raise a portion of 6000*l.* for daughters. The plaintiff being an only daughter, was entitled to 6000*l.*, which the real estate was sufficient to pay. It was held that the Duchess

(*a*) *Stronge v. Hawkes*, 4 De G. & J. 632, 651.

(*b*) *Hughes v. Williams*, 5 M. & G. 683; *Chappell v. Rees*, 1 De G. M. & G. 393.

(*c*) *Barnes v. Raester*, p. 57, *supra*.

(*d*) *Stronge v. Hawkes*, *supra*.

(*e*) *Dolphin v. Aylward*, 4 L. R. II. L. 486, 501.

(*f*) *Rinchiffe v. Parkyns*, 6 Dow. 216; cf. *Re Saunders-Davies*, 34 C. D. 482.

(*g*) 2 Atk. 444.

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of Athol having two funds, viz. the real estate under the settlement and copyholds and personal estate to which she could have recourse under the covenant, for the payment of her jointure, while the plaintiff had only one fund, viz., the real estate in settlement, she was entitled to turn the Duchess upon the copyhold and personal estates (*a*).

If a mortgagee chooses to take the *paraphernalia* of a widow in satisfaction of his debt by bond or covenant, Equity will ascertain the value, and make her a creditor for that upon the mortgaged estate (*b*).

Where an estate is subject to debts, legacies, or other charges and the owner mortgages a part of such estate, the mortgagee will as against the mortgagor, or a purchaser from him, have a right to throw such charges upon that part of the estate which is not comprised within his security (*c*).

In applying the doctrine of marshalling to mortgagees and creditors, the Court will not interfere with the first mortgagee's right to take his debt out of that part of his security which becomes first available upon the ground that other funds are comprised in his security (*d*); nor will a mortgagee who is executor and legatee of the mortgagor be compelled to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his hands (*e*); but if the mortgagee having a *double fund* has exercised his option in such a way as to disappoint a creditor by taking the only fund to which he could resort (*f*); or even if such only fund had been applied for convenience by the order of the Court (*g*); such exercise of option or order will not have the effect of disappointing the creditor with one fund only, who will therefore be entitled to stand *pro tanto* in the place of the former (*h*).

The doctrine, however, of marshalling is not applicable where no question can be raised as to the insufficiency of the single fund. Where, for instance, the person having the double fund offered to redeem the owner of the single fund, as that could only be done by paying him off, the doctrine of marshalling is inapplicable (*i*).

(*a*) See also *Legh v. L.*, 15 Si. 135.

(*b*) *Tipping v. T.*, 1 P. W. 729.

(*c*) *Haynes v. Forshaw*, 11 H. 93.
Finch v. Shaw, 5 H. L. Cas. 905.

(*d*) *Wallis v. Woodyear*, 2 Jur. N. S. 179.

(*e*) *Binns v. Nichols*, 2 Eq. 256.

(*f*) *Aldrich v. Cooper*, p. 44, *supra*.

(*g*) *Gwynne v. Edwards*, 2 Russ. 289, *note*.

(*h*) *Trimmer v. Payne*, 9 V. 203.

(*i*) *Gregg v. Arrott*, L. & G. t. Sugden, 246.

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Where an annuity deed and other securities were deposited by A. with bankers, a suit having been commenced to impeach the annuity deed, the bankers were compelled to resort to the other securities (a).

Judgment Debts.—Where there are judgments affecting estates, and some of the estates are settled for valuable consideration, and there has been either a mere concealment of the judgments and, *a fortiori*, if there is a declaration or covenant in the settlement that the estate is free from incumbrances, the trustees entitled to the settled estates will be entitled to the benefit of the doctrine of marshalling, by having the judgments thrown upon the unsettled estates, not only as against the settlor himself but also as against the judgment creditors of the settlor subsequent to the settlement, who do not stand in any better position than the settlor himself (b). In *Arcall v. Wade* a person being seised of several estates, and indebted by judgments, settled one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledged other judgments, it was contended, by the subsequent judgment creditors, that, as they only affected the unsettled estates, on the principle in *Aldrich v. Cooper*, as they had only one fund, they had a right to compel the prior judgment creditors, who had two funds,—the settled and unsettled estates,—to resort to the settled estates; or, at any rate, that the settled estates ought to contribute to the payment of the prior judgments. *Sugden, C.*, however, held that the subsequent judgment creditors had no equity to compel the prior judgment creditors to resort to the settled estates: on the contrary, that the prior judgments should be thrown altogether on the settled estates, and that the subsequent judgment creditors had no right to make the settled estates contribute (c).

Bankruptcy.—A trustee in bankruptcy takes the bankrupt's estate subject to all equities. So where A. took under a will two estates charged with legacies, and then made two distinct mortgages of each, if the proceeds of one estate are insufficient to pay the legacies and mortgage money, the mortgagee of such estate is entitled as against the mortgagor or his assignees in bankruptcy, to call upon the legatees to take so much of their legacies out of the other mortgaged

(a) *Duncombe v. Davis*, 1 H. 1. 195; 472; *Hughes v. Williams*, 2 Mac. & G. 683; *Chappell v. Rees*, 1 De G. M. & G. 393; *Re Lynch's Estate*, 1 Ir. Eq. 396.

(b) L. & G. 1. *Sugden*, 252.

(c) See also *Going v. Farrell*, Beat.

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estate, which was amply sufficient for the purpose as would leave a sufficiency to pay his mortgage (*a*). So if the owner of the double fund becomes bankrupt the equity can be enforced against his assignees (*b*), or others standing in his place (*c*).

Insurance Policies.—An Insurance office, where a policy is forfeitable on the suicide of the assured, except as to a beneficial interest vested in an assignee, cannot upon the suicide of the assured, compel the assignee to resort to other securities held by him for the debt, or to have it rateably paid out of all the securities (*d*). The result is the same when the policy has been assigned with other securities to the Company, for upon the death of the assured by suicide, the Company must repay themselves their debt out of the sum assured, and re-assign the securities to the parties entitled to them (*e*).

Surety. Where the creditor has two funds to which he can resort the surety is entitled to marshal not only as against the principal debtor, but also as against all persons claiming under him. In *Re Westzintous* (*f*), W. shipped oil to L. & Co., who, on its arrival, endorsed the bill of lading and deposited it with H. & Co., brokers, who advanced money on it. H. & Co. had previously advanced money upon other goods the property of L. & Co. deposited with them by way of security. L. & Co. having become bankrupt, the oil not having been paid for, the agents of W. claimed the oil from the master, who, however, delivered it to H. & Co. It was held first that the transfer of the goods to H. & Co. would in equity be treated as a pledge or mortgage only, and that W., therefore, by his attempted stoppage in transitu, acquired a right to such goods in equity against the assignees of L. & Co., subject to the lien of H. & Co. for the sum they had advanced upon them. Secondly, that W., by means of his goods, had become surety to H. & Co. for L.'s debt, and had a clear equity to oblige H. & Co. to pay his debt out of L.'s own goods deposited with him in case of his surety, and, all the goods of W. and L. & Co. having been sold, W. might insist on the proceeds of L. & Co.'s

(*a*) *Ex p. Hartley*, 1 Deac. 288; I. 486.

Broadbent v. Barlow, 3 De G. F. & J. 570; *Ex p. Alston*, 4 Ch. 168; *Heyman v. Dubois*, 13 Eq. 158; *Ex p. Salting*, 25 C. D. 148; *Yate-Lee, Bankruptcy*, 1891, p. 592.

(*b*) *Baldwin v. Belcher*, 3 Dr. & War. 173; *Ex p. Hartley*, *supra*.

(*c*) *Dolphin v. Aylward*, 4 L. R. 11.

(*d*) *Solicitors &c., L. A. Soc. v. Lamb*, 2 De G. J. & S. 251; *City Bank v. Sovereign L. A. Co.*, 50 L. R. 565.

(*e*) *White v. British Empire, &c., L. A. Co.*, 7 Eq. 394.

(*f*) 5 B. & Ad. 817.

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goods being appropriated to the payment of the debt and therefore that W. was entitled to have all the proceeds of the oil paid over to him (a). A surety, moreover, can compel the principal creditor, a mortgagee, to avail himself of his equitable right to consolidate securities, so that marshalling may be carried out in favour of the surety. In *Hegmann v. Dubois* (b), A., by policy 9322, assured his life for 2000*l.*—which he mortgaged to the office for 1000*l.* A. subsequently effected a policy 9695 for 1000*l.* in the same office, and then mortgaged it to the office to secure 500*l.* A. afterwards effected a policy 10,688 for 1000*l.* in the same office, and mortgaged this policy together with policy 9322 to the office to secure 1500*l.*, for the repayment of which the plaintiff was security. A. became bankrupt, and the plaintiff being sued by the Company, paid them 975*l.* 16*s.* 10*d.* in part discharge of the judgment and costs. Policy 10,688 was forfeited for non-payment of the premium. Upon A.'s death it was held by *Bacon*, V.-C., that as against A.'s assignee in bankruptcy the plaintiff was entitled to have the securities marshalled, so as to be paid out of the policy monies the sum which he had been compelled to pay under the judgment, including the costs of the action (c).

The right, however, of a subsequent mortgagee of one fund to compel a former mortgagee of the same fund and another to resort, in the first instance, to that fund which will leave his own either wholly or partially free, cannot be interferred with by a *surety* for the debt due to the first mortgagee paying off the debt and taking an assignment of the security (d).

Agents.—If an agent, as for instance a factor or consignee, pledge the goods of his principal and also goods of his own to secure a debt, the pledgee may be compelled by the principal to resort first to the agent's goods. In *Ex p. Alston* (e), a firm in Ceylon employed a firm in England as their agents and factors, and the course of the business was that the Ceylon firm consigned cargoes of coffee to the English firm for sale on their account, and drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, and bills accepted by the English firm against them, the English firm pledged the coffee which belonged to the Ceylon firm, together with certain securities of their own, with T., their

(a) See also *Spalding v. Ruding*, 6 B. 376; *Ex p. Alston*, 4 Ch. 168; and cases cited under note "Bankruptcy," *supra*, p. 62.

(b) 13 Eq. 158.

(c) Seton, 1893, p. 1739, F. 2.

(d) *South v. Bloxam*, 2 Hem. & M. 457; Seton, 1893, p. 1738, F. 1.

(e) 4 Ch. 168.

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broker, to secure a large debt due from them to him. The English firm became insolvent, and executed a creditors' deed under the Bankruptcy Act, 1861; and then T. sold the coffee which produced more than sufficient to cover the bills drawn against it, and enough of the other securities to satisfy his debt, and still held securities of the English firm in his hands. It was held by the Court of Appeal in Chancery that the Ceylon firm were entitled, as against the creditors of the English firm, to have the securities marshalled, so as to have a lien on the securities of the English firm remaining in the hands of T., for the balance due to them in respect of the consignments of coffee. A guarantee by one partner for the debt of the firm, which gives the creditor a right of proof against the separate estate of the partner in addition to his right of proof against the joint estate of the partnership, is also a security to which the principle of marshalling is applicable (*a*).

Descended Estates.—Marshalling may be enforced where the mortgaged estates have descended upon different persons (*b*).

Husband and Wife.—Married Woman.—Where husband and wife mortgage all the estates of the wife, and subsequently one of them to another person, the latter is entitled to marshal against the wife surviving (*c*).

In *Re Loder* (*d*), C., a widow, was entitled to one-third of the income of a fund restrained from anticipation, and to the other two-thirds free from restraint. She mortgaged all her interest in the fund to F. She then married, and charged her interest in favour of P. The income was sufficient to pay the interest on F.'s mortgage, and also the premiums of certain policies which formed part of his security. It was held that as between F. and P., F. should take his interest and the premiums first out of the one-third restrained so as to leave the remaining two-thirds free for P.

Landlord and Mortgagee.—The principle of marshalling has been applied to cases between a landlord and a mortgagee of chattels of a tenant, where the landlord has distrained not only the chattels comprised in the security, but also other chattels of the tenant. Thus in *Ex p. Stephenson* (*e*) a tenant mortgaged some personal chattels and

(*a*) *Ex p. Salting*, 25 C. D. 148; *Ex p. Alston*, 4 Ch. 168; *Re Westzinthus*; *Broadbent v. Barlow*, *supra*.

(*b*) *Lanoy v. Athol*, 2 Atk. 446.

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(*c*) *Tidd v. Lister*, 10 Ha. 157.

(*d*) 55 W. R. 115.

(*e*) 10 G. 589.

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being in possession of them and also of other personal chattels, the landlord distrained for rent upon both sets of chattels. The person in possession under the distress was requested by the mortgagee, and consented, to hold possession of the goods, or at least of the mortgaged goods, for him as well as the landlord, without prejudice to the landlord's rights. The tenant then became bankrupt, and after the bankruptcy the landlord's demand was satisfied by means of a sale of goods, some, if not all, of which were subjected to the mortgagee's security, whilst some or all of the goods to which the security did not extend remained unsold. It was held by *Knight-Bruce, V.-C.*, that the mortgagee was entitled to stand in the place of the landlord, and to be paid the amount of his mortgage debt out of the proceeds of the goods taken under the distress which were not comprised in his security (a).

Portions.—A testator devised his real estate subject to a trust to raise portions. His general personal estate was insufficient for the payment of debts, and the real estate and the specifically bequeathed personal estate had to contribute. Held that, as between the portioners and the persons entitled to the real estate, the former were not bound to contribute (b).

Two Funds, one subject to Lien.—The defendants, S. and Co., auctioneers, sold a brewery for X., and had in hand the sale-money, subject to their charges. They also sold for X. some furniture, and held the proceeds. X. assigned the proceeds of the brewery to the plaintiff W., who gave notice to S. and Co. S. and Co. paid X. the proceeds of the furniture money, and paid themselves out of the brewery money assigned to W. Held by C.A. that as S. and Co. had not equal claims or charges upon both funds, but a lien only on the brewery money, and a mere right of set-off as to the furniture money, they were right in so satisfying their lien, and that the principle of marshalling had no application (c).

The Crown—Marshalling takes place where the Crown has two funds to which it can resort under an extent, viz., an estate comprised within a mortgage and other property of the mortgagor:

(a) See also *Broadbent v. Barlow*, 3 De G. F. & J. 570; *Duncombe v. Davis*, supra, p. 62.

(b) *Re Saunders-Davies*, 34 C. D. 482; following *Raikes v. Boulton*, 21

B. 41, and explaining *Long v. Short*, 1 P. W. 403. Cf. *Re Bawden*, (1894) 1 Ch. 692.

(c) *Webb v. Smith*, 30 C. D. 192; and cf. *Re Dunlop*, 21 C. D. 583.

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"for" in such a case, as observed by *Ellen*, C., in the principal case, "a mortgagee whose interest in the estate was affected by an extent of the Crown, has found his way, even in a question with the general creditors, to this relief, that he was held entitled to stand in the place of the Crown, as to those securities which he could not attain per direction, because the Crown affected those in pledge to him. So when creditors were not entitled to be paid out of real estate, "there being a debt owing to the king, it was ordered that the king's debt should be satisfied out of the real estate, that the other creditors might be let in to have satisfaction of their debts out of the personal assets" (b).

Admiralty Cases.—The same doctrine was applied in the Admiralty Court, as for instance where there were several bonds and one was secured on the ship and freight, and another upon the ship, freight, and *cargo*, the bond-holders who had a charge on the cargo were not allowed to disappoint the other bond-holders who had none thereon, but were compelled to resort to the security against their ship and freight (c). So where bottomry bond-holders had two funds out of which they might be satisfied, the first being ship and freight, and the second the cargo, and the master could only resort to the first fund for payment of his claim for wages and disbursements, the funds would be marshalled by the Court so as to allow the master to be paid out of the proceeds of the ship and freight (d). And since the Judicature Act the equity, it would seem, is to be recognised and acted upon by every Division of the High Court of Justice (e).

(a) *Supra*, p. 44.

(b) *Sagitary v. Hyde*, 1 Vern. 455.

(c) *The Trident*, 1 Wm. Rob. 29, 35;
Le Constaucia, 2 Wm. Rob. 404, 406;
The Arab, 5 Jur. N. S. 417.

(d) *The Edward Oliver*, 1 L. R. Ad.

& Ecc. 379; and see *The Eugenie*, 4 L. R. Ad. & Ecc. 123; *The Irisidha*, Laish. 1.

(e) Judicature Act, 1873, s. 25, ss. 1 to 4, and s. 25, ss. 5 to 11.

HOWE v. EARL OF DARTMOUTH.
HOWE v. COUNTESS OF AYLESBURY.

May 22, 1802. 7 V. 137, 6 R. R. 96.

Conversion as between Tenant for Life and Remainderman.

General rule, that where personal property is bequeathed for life, with remainders over, and not specifically, it is to be converted into the Three per Cents., subject, in the case of a real security to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle.

Bequest of personal estate not held specific merely from being combined with a devise of land.

The Court will protect an executor in doing what it would order.

WILLIAM EARL OF STRAFFORD, by his will, dated the 25th of October, 1774, gave to his wife Anne, Countess of Strafford, *all his personal estate whatsoever* (except the furniture of Wentworth Castle) *for her life*, subject to the following outpayments and legacies. He also left to her all his houses, gardens, parks, and woods, and all his landed estates for her life; and afterwards all his personal and landed estates to his eldest sister Lady Anne Conolly for her life; and then to the eldest son of George Byng, Esq.; and afterwards to his second, third, or any later sons he may have by the testator's niece Mrs. Byng; and then to the eldest son and other sons successively of the Earl of Buckingham by his niece Caroline, but all of them to be subject to the following outpayments and legacies. He left his wife the sum of 15,000*l.* to dispose of for ever as she pleases, and the value of 500*l.* in furniture in Wentworth Castle of whatever sort she chooses, else the whole furniture to be hers if she meets with any difficulty in this disposition. He gave several legacies and annuities, and declared he would have all his debts paid, and gave all his servants a year's wages.

The testator died on the 10th of March, 1791. Anne Countess of Strafford died in his life, on the 9th of February, 1785. Lady Anne Conolly filed a Bill for an account of the personal estate, &c. By a

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decree made at the Rolls on the 17th of May, 1793, the usual accounts were directed; and it was declared that the plaintiff would be entitled to the interest of the clear residue of the testator's personal estate during her life; and an inquiry was directed who were the next of kin of the testator at the time of his death.

The Master's report, dated the 7th of March, 1793, stated the account of the personal estate, part of which consisted of the following stocks and annuities, standing in the testator's name at his death:—

4,320*l.* Bank Stock;

9,572*l.* per annum Long Annuities;

750*l.* per annum Short Annuities.

Under orders made in the cause, the sum of 15,000*l.* and 4,000*l.* had been paid in by the executors, and laid out in 3*l.* per cent. Consolidated Annuities.

By a decretal order, made on the 7th of May, 1796, the balance of the personal estate in the hands of the executors, and of the interest &c., was ordered to be paid into the Bank; and that the executors should transfer the 4,320*l.* Bank Stock, the 9,572*l.* per annum Long Annuities, and 750*l.* per annum Short Annuities, to the Accountant-General, in trust in the cause; and that the said funds, when so transferred, should be sold with his privity; and that the money to arise by such sale should be laid out in the purchase of 3*l.* per Cent. Annuities, in trust in the cause, subject to a further order; and that the Master should appropriate a sufficient part of the said Bank Annuities, when purchased, to answer the growing payments of the several annuities; and that, as any of the annuitants should die, the funds appropriated respectively should fall into the general residue, with liberty to apply; and it was ordered, that the interest of the residue of the said Bank Annuities after such appropriation, and also the interest and dividends of the said 4,320*l.* Bank Stock, should be paid to the plaintiff Lady Anne Conolly for her life, and on her death any person or persons entitled thereto were to be at liberty to apply; and after providing for the costs out of the balance of the personal estate, and for the arrears of the annuities out of the sum of 2,067*l.* 6*s.* 1*d.*, the balance of the interest and dividends received by the executors and ordered to be paid into the Bank, it was ordered that the remainder should be paid to Lady Anne Conolly; and also

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that 1,846*l* 1*s*. 7*d*., cash in the Bank, which had arisen from interest of the funds in which parts of the testator's personal estate had been invested, should be also paid to her; and that the dividends of 2461*l* 4*s*. 10*d*., 3*l*. per Cent. Bank Annuities, in which the sums received by the executors from the personal estate had been invested, should from time to time be paid to her during her life, and on her death any persons claiming to be entitled were to be at liberty to apply; and it was ordered, that the executors should get in the outstanding personal estate, and that so much thereof as should consist of interest should be paid to Lady Anne Conolly, and so much as consisted of principal should be paid into the Bank, subject to farther order.

The Masters farther report, dated the 10th of December, 1796, stated that the Bank Stock and the Long and Short Annuities had been sold, and the produce laid out in 3*l*. per Cent. Annuities.

Upon the death of the plaintiff Lady Anne Conolly, the suit was revived by her executors; and the cause coming on before Lord *Almon*, then Master of the Rolls, for farther directions on the subsequent report, it was insisted, on the part of Mr. Byng, that Lady Anne Conolly had received, for interests and dividends accrued on the Bank Stock and the Long and Short Annuities, and the produce thereof laid out in Bank 3*l*. per Cent. Annuities, large sums more than she was entitled to, if those funds had been sold, as they ought to have been immediately after the testator's decease, and the produce invested in a permanent fund, viz., the 3*l*. per Cent. Consolidated Bank Annuities. The Master of the Rolls directed inquiries with reference to that question between the executors of Lady Anne Conolly and Mr. Byng, and the other parties interested in the residue of the personal estate; with liberty to present a petition to re-hear the order of 1796, as to the payments thereby directed to be made to Lady Anne Conolly.

The re-hearing was argued before Lord *Rosslyn*, but no judgment was given.

Mr. *Manxfield*, Mr. *Lloyd*, Mr. *W. Agar*, Mr. *Wingfield*, Mr. *Serjeant Palmer*, Mr. *Bell*, and Mr. *Richards*, for different parties, in support of the petition of re-hearing.

The tenants for life of such funds as Bank Annuities, carrying a

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higher interest, and Long and Short Annuities, wearing out rapidly, are not entitled to the enjoyment of them in specie; but there is a standing rule of the Court, for the benefit of all parties interested, that those funds shall be laid out in the more equal fund the 3l. per Cents. No party ought to suffer by the circumstance, that what ought to be done, and what the Court would have directed to be done, immediately on the testator's death, was not done. The state of this question is, that the late Lord Chancellor went out of office without having delivered any opinion upon the point; and Lord *Abraham* thought he could not decide against the order of the Lord Chancellor, supposing his Lordship to have been of opinion, that there was something particular in this will, upon the distinction between the gift of a general residue for life, with remainder over, and a specific bequest of this sort of property; in which case it could not be sold, and the dividends follow, of course, from the death of the testator; even the rule, that takes place in general legacies postponing the payment of interest to the end of a year from the death, not attaching upon it. But there is nothing specific in this will. This is a mere gift of the residue of the personal estate for life, subject to the payment of debts, legacies, and annuities. Under every such will, the Court has always sold this sort of property, if there was any wearing out fund, not specifically given, or to any fund as to which the tenant for life had an advantage over those in remainder * * *

Mr. *Romilly*, and Mr. *Trower*, for the executors of Lady Anne Conolly, in support of the decree.

The first question is, whether Lady Anne Conolly was entitled to the annual produce of the personal estate at the death of the testator; if not, the next consideration is, whether the executors having paid it to her, and particularly the dividends of the Bank Stock, those payments ought to be called back.

The personal estate is given to her for life specifically. As this disposition is expressed, it is the same as if the testator had enumerated the particular articles, of which the personal estate consisted. He has not given his personal estate to his executors, in trust to sell, &c., and that what remains shall be given to those persons: but he has given the personal estate to them specifically as he has given the land. The Lord Chancellor considered, that

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there was nothing in the will, which made it necessary for the executor to convert his property into any other fund. For many purposes a bequest of all the personal estate is considered specific; for instance, upon the question of exoneration, where there is a charge of debts. There is no doubt of the general rule; but this question does not depend upon it * * *

The second question is of considerable novelty, as to what is to be done with the dividends received, particularly upon the Bank Stock. With reference to the Bank Stock, as distinguished from the Annuities, no case has established that the executor had done wrong by paying to the tenant for life the interest of some permanent fund, though producing more than if the property was invested in the 3l. per Cents.; and to make this party account for what she has received, that proposition must be made out * * *

The *Lord Chancellor* [*Eldon*] desired the counsel in reply not to trouble himself upon the point whether the bequest was specific, and to advert to the Bank Stock.

Mr. Mansfield, in reply.—In this respect there is no difference between the Bank Stock and the Annuities. The price is perfectly accidental, and is never considered. The Court says, first, Bank Stock is the stock of a trading company, not a government fund, secured by the Legislature. The former also produces a high dividend, and is therefore more liable to fluctuation and uncertainty. For these reasons, this Court never suffers those funds to remain which are considered hazardous, and, to a certain extent, wasteful. The tenant for life cannot have any more right to advantage in the shape of that large dividend, than of Long and Short Annuities. The Court goes further, ordering the conversion of 4l. per Cents., a government fund probably on the principle that they are liable to be redeemed, and not so a permanent fund. With respect to refunding, these are trustees. Their conduct cannot affect the rights; and it happens that there are dividends now due to Lady Anne Conolly in Court, which, if the decision is against her, the executors have no objection to apply to the refunding, if it is to take place * * *

LORD CHANCELLOR ELDON.—No question arises upon this will except whether this is a specific bequest of such personal estate as

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was the testator's at the time of his death. Lord *Rosslyn* is represented to have had considerable doubt whether it was not specific, and if it is, I agree, not only Lady Anne Conolly, up to the date of the decree, but afterwards, and Mr. Byng and the other persons in remainder, must take the specific produce of what is specifically given. But if it is so to be considered, the decree is not correct, considering the bequest specific to the date of that decree, and no longer. It is wrong, therefore, in any way.

Upon the question, whether this is specific, it must be either upon the words describing the personal estate, or upon the construction of those words, coupled with the devise of all his landed estates.

With respect to the latter, every *devise of land*, whether in particular or general terms, must of necessity be specific, from this circumstance, that a man can devise only what he has at the time of devising. Upon that ground, in a case at the Cockpit, it was held, that a residuary devisee of land is as much a specific devisee as a particular devisee is.

But it is quite different as to *personal estate*. The question must be, *did he mean to dispose of what he had at the date of the will, or of that which he should have at his death?* If he meant the former, then every part of that identical personal estate, which is disposed of between the date of the will and the death, is a legacy adeemed *pro tanto* it is gone. If the question is, whether those subjects, to be acquired between the date of his will and his death, should pass, I cannot say he did mean that. If not it can only be specific thus, that the persons to take personal estate he should have at his death in different interests should enjoy it as he left it.

Not one word of this will goes to that. It is given as "all his personal estate;" and the mode in which he says it is to be enjoyed, it is to one for life, and to the others afterwards. Then, the Court says, *it is to be construed as to the perishable part, so that one shall take for life, and the others afterwards; and unless the testator directs the mode, so that it is to continue as it was, the Court understands that it shall be put in such a state, that the others may enjoy it after the decease of the first; and the thing is quite equal; for it might consist of a vast number of particulars, for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency, perhaps. If, in this case, it is equitable that Long or*

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Short Annuities should be sold, to give every one an equal chance, the Court acts equally in the other case; for those future interests are, for the sake of the tenant for life, to be converted into a present interest being sold immediately in order to yield an immediate interest to the tenant for life. *As in the one case, that in which the tenant for life has too great an interest, is melted for the benefit of the rest; in the other, that, of which, if it remained in specie, he might never receive anything, is brought in, and he has immediately the interests of its present worth.*

As to the annuities charged upon this estate, the tenant for life, it entitled to the whole, would be properly paying out of the aggregate property the annuities. But it would be great injustice to those in remainder, if these capital sums were paid out of that part of the bulk of the property which does not consist of perishable interests and were not to be thrown in proportion upon the perishable part. The ordinary rule of apportioning requires, that, in some degree, a provision should be made out of those (the Short Annuities), if they remain, and not out of the 3*l.* per Cents. only.

The cases alluded to, where personal estate has been taken to be specifically given, do not apply. First where a residuary legatee takes it [the residue] as a specific gift, not subject to debts, the inference, that he is to take that personal estate, is not made, in general cases, upon the bequest of all the testator's personal estate, but upon the effect of that, connected with what arises out of other parts of the will, with regard to the intention to fix up on other funds charges that would primarily fall upon that fund, and that must be made out, not by conjectures, but by declaration plain, or manifest intention (*a*). That is the principle upon which it is agreed these cases are to be construed; and the intention has never been considered manifest merely from a disposition of the personal estate in the same clause with land, which must be taken to be specifically given. But those cases do not go the length, that, if the enjoyment is portioned out in life interests, with remainders over, it is specific. I am clearly of opinion, therefore, that this is not a case in which the personal estate is in this sense specifically given, with a direction that it shall remain specifically such as it was at the testator's death; and the purposes for which it is given are those for which it is

(a) See *Ancaster v. Mayer*, *supra*, p. 1.

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admitted there is a general rule, that these perishable funds are to be converted in such a way as to produce capital bearing interest.

I was astonished when that was doubted. From general recollection, I had considered the practice to be, that the first moment the observation of the Court was drawn to the fact, the Court would not permit property to be laid out, or to remain upon such funds, under a direction to lay it out in government securities but would immediately order it to be converted into that which the Court deems, for the execution of trusts, a government security.

I pass over what has been said as to real securities; for there is a great difference between real securities, or Bank Stock, for instance, and government securities. Bank Stock is as safe, I trust and believe, as any government security; but it is not government security; and therefore this Court does not lay out, or leave, the property in Bank Stock; and what the Court will decree, it expects from trustees and executors; I will not state what the Court would do, where executors had not made these conversions. That depends upon many circumstances. But I abide by Lord *Kenyon's* rule in the case of *Mr. Champion*, an executor, before which time it was doubted whether an executor could lay out the property in *3l. per Cents. (a)*. Lord *Kenyon*, who was a repository of valuable knowledge, produced a dictum of Lord *Northampton*, that the Court would protect an executor in doing what it would order him to do. The Court in this case would order him to do that.

It is not so in the case of a mortgage. The Court would not permit a real security to be called in without an inquiry, whether it would be for the benefit of every person; and it is accident that some part of the assets will produce more interest than a genuine trust security. In some instances, there is little doubt, it may be not only for the benefit of the tenant for life, but for the substantial interest of the remainderman, that the property should not be shifted from a good real security.

The question then is, whether the Court will change the fund, not as between the remainderman and the executor, but in a question between the tenant for life and the remainderman; and the question with the executor cannot well arise, so as to be acted upon

(a) See Order 22, r. 17; R. S. C. Nov. 1888; and Trustee Act. 1897.

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till a failure by the tenant for life, or those who represent him; for the justice of the case, if the tenant for life has received so much, would be, that he should bring it back in case of the executor, who paid him. If the rule is, that the fund shall not remain, it is impossible to say, the date of the decree shall decide. I do not like to put it upon the possibility of collusion; but that is not to be totally neglected, for it may happen, that the executor himself may be the tenant for life, and then he has an interest in delay. Of necessity there must be a great delay, before there can be a final decree in a cause of great property, and it may be very much protracted where there is an interest. However, I do not put it upon that. But if the principle is, that the Court, when its observation is thrown upon it, will order the conversion, it ought to be considered, to all practicable purposes as converted, when it could be first converted. That is the genuine inference from the other principle. If the Court has ever attended to the difficulties often thrown before it, with regard to perishable property of other kinds, as leasehold estate, &c., it never has as to stock. You can learn the price at which it might be converted on any day, and the moment the Court was ordered by the Legislature to lay out its funds in stock, it necessarily held, that for this purpose stock must always be considered of the same value. It is for the benefit of the creditor that it should be thrown into a lasting fund; and it is equal to all the parties interested. As to Bank Stock, the Court has ordered 4*l.* per Cents. and 5*l.* per Cents. to be sold and converted into 3*l.* per Cents. upon this ground, that, however likely, or not, that they may be redeemed, the courts look at them as a fund that is not permanent, though it may remain for ever; and considers, that from that quality, there is an advantage to the present holder, who gets more interest, because they are liable to be redeemed. I do not know whether the reasoning is as just in practice as it is in theory. Property cannot be laid out by this Court in Bank Stock in the execution of a trust to lay it out in government securities, for it is not a government security. Converting that, therefore, the executors would have done what this Court would have ordered, and that falls under the same consideration, and the advantage, if any, ought not to accrue to the tenant for life. The account, therefore, must go as to that, as well as the Long and Short Annuities, *from the time at*

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which it would have been converted, if the observation of the Court had been drawn to the fact that the executors were possessed of those funds.

The petition of re-hearing is therefore well founded.

NOTES.

1. Generally.
2. Intention to give enjoyment in specie, p. 79.
3. Income of residue as between legatees for life and successors, p. 86.
4. Duties and liabilities of trustees as to conversion, p. 89.

1. Generally.

When there is a residuary bequest of property to persons in succession, and no trust for conversion, and such property is not invested upon securities which would be authorised by the Court, then, unless there is an express or implied expression of intention by the testator that such property is to be enjoyed in specie, the general rule of the Court is, that it is to be converted and invested in 2½ per Cent. Consols (*a*).

The rule is applicable to trusts in settlements created by deed, where the whole or an aliquot part of the unrealised estate of a deceased person is settled, or where there is a covenant to settle after-acquired property (*b*).

The rule is applicable to property of a wasting or perishable kind (*c*), and, in favour of the tenant for life, to reversionary property (*d*), and to all other existing investments not of the recognised character, and which are consequently deemed to be more or less hazardous (*e*); but not to investments which are permanent though hazardous, *Re Sheldon* (*f*).

For where personal estate is given in terms amounting to a

(*a*) *Tickner v. Old*, 18 Eq. 426; *Thursby v. T.*, 19 Eq. 406; *Macdonald v. Irvine*, 8 C. D. 101; *Roberts v. Morgan*, 23 L. R. Ir. 118; *Seton*, 1893, p. 1417; *Jarman*, 1893, p. 576; *Theobald*, 1895, p. 443; *Lewin*, 1891, p. 318.

(*b*) *Vaizey, Investment*, 1890, p. 26.

(*c*) *Fryer v. Butter*, 8 Si. 442; *Lord v. Wightwick*, *infra*.

(*d*) *Hinves v. H.*, 3 Ha. 611; *Wilkinson v. Duncan*; *Johnson v. Routh*; *Harrington v. Atherton*, *infra*.

(*e*) *Macdonald v. Irvine*, 8 C. D. 112; *Prendergast v. P.*, 3 H. L. Cas. 218; *Lord v. Wightwick*, 6 H. L. Cas. 803; *Baud v. Fardell*, 7 De G. M. & G. 633, 634; *Johnson v. Routh*, 27 L. J. Ch. 309; *Harrington v. Atherton*, 2 De G. J. & S. 352; *Wilkinson v. Duncan*, 23 H. 169 and the observations of *Coltatham, C.*, in *Pickering v. P.*, 4 My. & C. 298; *Porter v. Baddeley*, 5 C. D. 162.

(*f*) 39 C. D. 51.

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general residuary bequest, to be enjoyed by persons in succession, the interpretation the Court, in the absence of evidence of a contrary intention, puts upon the bequest is, that the persons indicated are to enjoy the same thing in succession: and in order to effectuate that intention, the Court, as a general rule, converts into permanent investments so much of the personalty as is not so invested, and also reversionary interests (*a*). The rule did not originally ascribe to testators the *intention* to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do: but the Court, finding the intention of the testator to be, that the objects of his bounty shall take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention (*b*).

It follows from what is laid down in the principal case that all property, of whatever kind, included in a residuary bequest, whether wasting, perishable, or even permanent in its character, if it be not invested in authorized securities (*c*), or real securities, would, in the absence of any directions to invest, be converted and invested by order of the Court, in $2\frac{3}{4}$ per Cent. Consols (*d*); and it will be a breach of trust on the part of the trustees not to act in the same manner (*e*), having regard, however, it is presumed, to the Act and Rules of Court referred to in note (*c*).

"It is quite clear that the rule must be applied unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied: the burden in every case being upon the person who says the rule of the Court ought not to be applied," per *James, L. J.*, in *Macdonald v. Irvine* (*f*).

For instances of the application of the rule laid down in the principal case, see the cases cited in note (*g*).

(*a*) *Macdonald v. Irvine*, *supra*.

(*b*) *Cafe v. Bent*, 5 Ha. 35; but see *Pickering v. P.*, 4 My. & C. 298.

(*c*) As to which see R. S. C., 26 Nov. 1888, Order 22, r. 17; Annual Practice, Part II.; and The Trustee Act, 1893.

(*d*) *Vaizey, Investment*, 1890, p. 27; *Roberts v. Morgan*, 33 L. R. Ir. 118; *Thornton v. Ellis*, 15 B. 193.

(*e*) *Bate v. Hooper*, 5 De G. M. & G. 338.

(*f*) 8 C. D. (1878), p. 124.

(*g*) *Lichfield v. Baker*, 2 B. 481;

Sutherland v. Cooke, 1 Coll. Ch. R. 498; *Pickup v. Atkinson*, 4 Ha. 625; *Caldcott v. C.*, 1 Y. & C. C. C. 312; *Johnson v. J.*, 2 Coll. Ch. R. 441; *Benn v. Dixon*, 10 Si. 636; *Chambers v. C.*, 15 Si. 183; *Lichfield v. Baker*, 13 B. 407; *Oakes v. Strachen*, 13 Si. 414; *Hood v. Clapham*, 19 B. 90; *Jebb v. Tugwell*, 20 B. 84; 7 De G. M. & G. 663; *Blann v. Beil*, 5 De G. & Sm. 658; 2 De G. M. & G. 775; *Howard v. Kay*, 27 L. J. N. S. (Ch.) 448; *Craig v. Wheeler*, 29 L. J. Ch. 374; *Re Shaw's Trusts*, 12 L. R. Eq. 125.

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Annuities.—The rule applies in favour of one having a life annuity charged on a residue (*a*). So, likewise, if it be charged on a wasting fund, as in *Fryer v. Butler* (*b*), where the testator gave to M. W. an annuity of 40*l.* for life payable out of his Long Annuities, and directed that at M. W.'s death the principal out of which the annuity arose should go to his next of kin then living; and he further directed that the annuity should be secured on his stock of Long Annuities. The testator died possessed of 569*l.* Long Annuities: *Shadwell v. C.*, held, that a fund for payment of the annuity ought to be provided in the Three per Cents., and that the money required for that purpose ought to be raised by the sale of part of the Long Annuities, and that the remainder of the Long Annuities formed part of the testator's residuary estate.

2. Intention to give Enjoyment in Specie.

This intention may be express (*c*), or may be inferred from the terms of the whole will, and the authorities show an inclination to allow small indications of intention to prevent the rule (*d*). Where the interests of successive takers of a residue are not conflicting, as where a residue is given to a widow for the maintenance of herself and children, with remainder to the children, the case for conversion is weaker than where the interests of the tenant for life and remainderman are antagonistic (*e*). The result is the same where an absolute gift to a daughter is cut down by way of settlement to a life interest (*f*).

Where wasting or reversionary property is given to persons in succession *specifically*, in the strict sense of that term, then there can be no reason for converting it (*g*).

But the mere absence of a direction to convert the property has never been construed to mean that it should be enjoyed in specie by legatees in succession (*h*).

If, however, an intention can be collected from the will, that

(*a*) *Wightwick v. Lord*, 6 H. L. Cas. 217.

(*b*) 8 Si. 442.

(*c*) *Pickering v. P.*, 4 My. & C. 289; *Collins v. C.*, 2 My. & K. 703.

(*d*) *Morgan v. M.*, 11 B. 72; *Hinves v. H.*, 3 Ha. 611; but cf. citation from *Macdonald v. Irvine*, p. 78, *supra*.

(*e*) *Marshall v. Brenner*, 2 Sm. & G. 237; *Re Eaton*, 70 L. T. 761.

(*f*) *Vachell v. Roberts*, 32 B. 140.

(*g*) *Vincent v. Newcombe*, You. 599; *Cockran v. C.*, 14 Si. 248.

(*h*) *Johnson v. J.*, 2 Coll. Ch. R. 441; *Morgan v. M.*, 14 B. 72, 83.

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property shall be enjoyed in specie, as it existed at the death of the testator, although the property be not, in a technical sense, specifically bequeathed (*a*), where, for instance, in the gift there is a partial enumeration of articles, which does not render the residuary gift specific (*b*), it ought not to be converted (*c*), even although the trustees have given to them a discretionary power to do so (*d*); if such power is given to the trustees, with a view to the security of the property, and not with a view to vary or affect the relative right of the legatees (*e*). And where a residuary devise and bequest contains certain property the gift of which is specific, such as lands, freeholds, &c., there is a ground for inferring that other property included in the residue such as Long Annuities, were also intended to be given specifically (*f*).

The argument in favour of specific enjoyment of things partially enumerated is, perhaps, weaker when they are given through the intervention of a trust (*g*).

A direction for conversion may be so expressed as to indicate an intention that there should be no conversion by the Court. Thus, a trust to convert at a particular time, *e.g.* the death of the tenant for life, will entitle the tenant for life to specific enjoyment (*h*).

(*a*) As to which see *Bothamley v. Sherson*, 20 Eq. 304; *Re Ovey*, 20 C. D. 676.

(*b*) As to which see *Sutherland v. Cooke*, 1 Coll. Ch. R. 498; *Re Green*, 40 C. D., p. 618.

(*c*) *Hinves v. H.*, 3 Ha. 611; *Macdonald v. Irvine*, 8 C. D. 410; *Pickup v. Atkinson*, 4 Ha. 625; *Booth v. Coulton*, 7 Jur. N. S. 207; *Pickering v. P.*, 4 My. & C. 298; *Hubbard v. Young*, 10 B. 203; *Harris v. Poyner*, 1 Dr. 181; *Collins v. C.*, 2 My. & K. 703.

(*d*) *Lord v. Godfrey*, 4 Madd. 455.

(*e*) *Milne v. Parker*, 12 Jur. 171; *D'Aglio v. Fryer*, 12 Si. 1; *Evans v. Jones*, 2 Coll. Ch. R. 516; *Marshall v. Bremner*, 2 Sm. & G. 237; *Hubbard v. Young*, 10 B. 203; *Harris v. Poyner*, 1 Dr. 181; *Morgan v. M.*, 14 B. 72; *Mills v. Brown*, 21 B. 1; *Fielding v. Preston*, 1 De G. & J. 438; *Boys v. B.*, 28 B. 436; *Thursby v. T.*, 19 Eq.

406; but see cases cited p. 88, *infra*, notes (*a*) (*b*).

(*f*) *Bethune v. Kennedy*, 1 My. & C. 20; *Simpson v. Earles*, 11 Jur. 921; *House v. Way*, 12 Jur. 958; *Burton v. Mount*, 2 De G. & Sm. 383; *Holgate v. Jennings*, 24 B. 623; but cf. *Blann v. Bell*, 5 De G. & Sm. 658.

(*g*) *Craig v. Wheeler*, 29 L. J. Ch. 374; 8 W. R. 172; *Vincent v. Newcombe*, You. 399; *Vaughan v. Buck*, 1 Ph. 75; *Blann v. Bell*, 2 De G. M. & G. 775; *Bowden v. B.*, 17 Si. 65; *Hood v. Clapham*, 19 B. 90; *Boys v. B.*, 28 B. 436; *Thursby v. T.*, 19 Eq. 395.

(*h*) *Alcock v. Sloper*, 2 My. & K. 699; *Harris v. Poyner*, 1 Drew. 181; *Simpson v. Lester*, 33 L. T. 6; *Daniel v. Warren*, 2 Y. & C. C. C. 290; *Harvey v. H.*, 5 B. 134; *Rowe v. R.*, 29 B. 276; *Gray v. Siggers*, 15 C. D. 74; *Re Leonard*, 29 W. R. 234.

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A power to vary securities is important, as showing that the testator did not intend his residue to remain on perishable securities (*a*). But it is said by *Leach*, V.C., in *Lord v. Godefroy* (*b*), that such power is given to trustees with a view to the security of the property, and not with the view to vary or affect the relative rights of the legatees.

And where the property is given over specifically at the death of the tenant for life (*c*), and where the conversion of a part is expressly postponed for a certain time, the tenant for life will be entitled to specific enjoyment during that period (*d*), so where there is a power to sell or renew leaseholds with his consent (*e*).

Where a tenant for life is entitled to enjoy in specie, the rule is that investments may remain, but *debts* must be realised (*f*). But a power given in a will by a testator to trustees, after a direction to sell and convert his real and personal estate, "to continue invested any of his government stocks and real securities," was held to be confined to such government stocks as were of a permanent character, and therefore not to include Long Annuities (*g*).

A direction that certain property—shipping—comprised in a residuary bequest should not be converted during a certain term of years is tantamount to a direction that it should remain in specie during that term, and the tenant for life will be entitled to the income of it while it so remains in specie (*h*), or until it is sold under a discretionary power vested in trustees. So, where there is a direction in a will, that trustees should in their sole discretion sell so much, and such part of the residuary estate as they might think necessary (*i*), or where the discretion to sell is general (*k*), especially if the directions be not to sell without consent (*l*), the tenant for life until conversion enjoys in specie. And where there is a direction to

(*a*) *Morgan v. M.*, 14 B. 72, 85.

(*b*) 4 Madd. 459.

(*c*) *House v. Way*, 12 Jur. 958; *Harris v. Poyner*, 1 Dr. 174; *D'Aglié v. Fryer*, 12 Si. 1; *Collins v. C.*, 2 My. & K. 703.

(*d*) *Green v. Britten*, 1 De G. J. & S. 649.

(*e*) *Hinves v. H.*, 3 Ha. 609; *Crowe v. Crisford*, 17 B. 507; *Hind v. Selby*, 22 B. 373; *Skirving v. Williams*, 24 B. 275.

(*f*) *Holgate v. Jennings*, 24 B. 623; *Crowe v. Crisford*, 17 B. 507.

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(*g*) *Tickner v. Old*, 18 Eq. 422; but see *Re Sheldon*, 39 C. D. 51, distinguishing *Porter v. Baddeley*.

(*h*) *Green v. Britten*, 1 De G. J. & S. 655; followed *Re Lambert*, 36 Sol. Jo. 327; *Brown v. Gellatly*, *infra*, p. 87.

(*i*) *Re Sewall*, 11 Eq. 80; *Re Leonard*, 29 W. R. 234.

(*k*) *Bowden v. B.* 17 Si. 65; *Burton v. Mount*, 2 De G. & S. 384; *Skirving v. Williams*, 24 B. 275; *Rowe v. R.*, 29 B. 276.

(*l*) *Hinves v. H.*, 3 Ha. 609; *Ellis v. Eden*, 23 B. 513.

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pay the produce of any portion not converted to the tenant for life, he will be entitled in the meantime until conversion (*a*).

An express power to sell realty does not afford any indication of intention that the wasting securities should be specifically enjoyed (*b*); nor, moreover, will a mere power to retain investments entitle a tenant for life to specific enjoyment (*c*).

But a discretion in trustees to retain or sell any part of the trust estate (*d*), may amount to an expression of intention that the tenant for life should enjoy it in specie. In *Re Thomas* (*e*) there was an absolute trust for conversion followed by an absolute discretion to retain, and the Court held that the income of certain unauthorised investments retained by the trustees was to be enjoyed by the tenant for life. A power to postpone the sale of a business involves a power to continue it, and the tenant for life takes the income (*f*).

A direction to discharge incumbrances on (*g*), to renew or keep in repair (*h*), or a power to demise leaseholds (*i*), is an indication of intention that the tenant for life should enjoy them in specie.

An exception from a general direction to convert may show an intention that the exempted property is to be enjoyed in specie as in *Willday v. Sandys* (*k*), where a testator gave his residuary estate to trustees in trust to convert into money such parts thereof as should not at his decease consist in money, or be invested in any of the public funds or government securities, and to invest the same in such public funds or government securities as to them should seem most advantageous, *Romilly, M. R.*, held that the Long Annuities, of which the testator died possessed, were within the exception from the trust for conversion (*l*).

And where in a will before the Wills Act, the trust of a residue

(*a*) *Mackie v. M.*, 5 Ha. 70; *Wrey v. Smith*, 14 Si. 202; *Johnston v. Moore*, 27 L. J. Ch. 453; *Lean v. L.*, 23 W. R. 484; *Miller v. M.*, 13 Eq. 263.

(*b*) *Jebb v. Tugwell*, 20 B. 84.

(*c*) *Porter v. Baddeley*, 5 C. D. 542; *Re Llewellyn*, 29 B. 171; *Preston v. Melville*, 15 Si. 35.

(*d*) *Gray v. Siggers*, 15 C. D. 74, in which case *Porter v. Baddeley*, 5 C. D. 542, was not cited; *Simpson v. Lester*, 4 Jur. (N. S.) 1269; *Re Leonard*, 29 W. R. 234; *Green v. Britten*, 1 De G.

J. & S. 649; *Re Chancellor*, 26 C. D. 42; *Re Sheldon*, 39 C. D. 51.

(*e*) (1891) 3 Ch. 482. See *Re Pitcairn*, W. N. (1895) 139.

(*f*) *Re Crowther*, (1895) 2 Ch. p. 60

(*g*) *Re Sewell*, 11 Eq. 80.

(*h*) *Crowe v. Crisford*, 17 B. 507.

(*i*) *Hinde v. Selby*, 22 B. 373; *Thursby v. T.*, 19 Eq. 395.

(*k*) 7 Eq. 455.

(*l*) *Howard v. Kay*, 27 L. J. Ch. 448; *Grant v. Mussett*, 8 W. R. 330. Cf. *Porter v. Baddeley*, *supra*; *Preston v. Melville*, 15 Si. 35.

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was to pay the rents, issues, profits, and annual proceeds to persons in succession, and it appeared that the testator had no other property except leaseholds, to which the term "rents" was applicable, *Langlede*, M. R., held the testator did not intend the leaseholds to be converted (*a*). So in *Alcock v. Slopers* (*b*) there was a general residuary bequest, upon trust to permit the testator's widow to receive the rents, profits, dividends, and proceeds thereof, for life, *Leach*, V.-C., held, that the word "dividends" had reference to Long Annuities, of which part of the testator's estate consisted, and that the use of the word "dividends" was equivalent to a direction that the widow should enjoy the Long Annuities in specie. These decisions were commented on by *Wigram*, V.-C., in *Pickup v. Atkinson* (*c*), in which case the testator died possessed of leaseholds, Long Annuities, and 3/4. 5s. per Cent. Annuities, and ready money, and his Honour held, that a bequest of the rents and profits, dividends, and interest of a residue, comprising that property, did not indicate an intention that it was to be enjoyed in specie; he thought that the correct reasoning upon those words, considered alone, must be analogous to that which is applied to the residue itself. The mere enumeration of particulars in the latter case does not give a specific character to the bequest, because the whole clause is, in effect, a mere residuary bequest (*d*). He thought the same observation applied to a case like that, the enumeration of the particulars of income being nothing more than a gift of the income of the residue, which means income only. That conclusion appeared to his Honour to be put beyond dispute when it was considered that the words "rents, profits, dividends, and interest," in that case meant rents, profits, dividends, and interest, not of the property the testator then had, but of such property, real, personal, or mixed, as he might happen to have at the time of his death (*e*). The same conclusion arose from the words of the gift over, namely, "the whole of such residue of my said property" (*f*). However, in *Coff v. Bent* (*g*), where there was a direction, which referred to the general residue of the estate (which included leaseholds), and not to leaseholds specifically bequeathed, that the trustees should retain a percentage on the rents to be collected, his Honour held the direction, fortified

(*a*) *Goodenough v. Trombando*, 2 B. 512; *Skirving v. Williams*, 24 B. 275; *Vachell v. Roberts*, 32 B. 140.

(*b*) 2 My. & K. 699.

(*c*) 4 Ha. 625.

(*d*) See *Re Greenastoths*, 40 C. D. 610.

(*e*) See Wills Act, s. 24.

(*f*) And see *Booth v. Coulton*, 7 Jur. (N. S.) 207.

(*g*) 5 Ha. 36.

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by other expressions in the will, was evidence that the testator contemplated the enjoyment in specie of the leasehold property comprised in the general residue, by the legatees (*a*).

Where, however, there was an *express trust* to convert the residuary personal estate into money, immediately after the testator's death, and to invest the amount "in the Bank of England," it was held that a mere direction to permit a person to receive all the rents and profits, dividends, or annual produce of his personal estate for life for his own use was not sufficient to qualify the direction to convert, and authorise the trustees to pay the tenant for life the dividends of the Long Annuities in specie (*b*).

A direction that powers of attorney should be given to *cestuis que trust* entitled to receive in succession the income of property, may show the testator's intention that they were to enjoy it in specie (*c*).

No implication arises that the general residue is not to be converted from the fact that there is a direction to convert certain specific parts of the personal estate (*d*). Nor do express directions that the residue of personal estate shall be sold from time to time by executors for payment of debts and legacies, raise an implication that it is to be sold for no other purpose, so as to prevent the operation of the general rule (*e*).

A direction to divide the property after the death of the tenant for life, has been held to indicate an intention that the tenant for life should enjoy the property in specie (*f*). But see the observations of Wigram, V.-C., in *Pickup v. Atkinson* (*g*).

Any expression from which it can be inferred that the testator intended the remainderman to take the same property as the tenant

(*a*) See *Hunt v. Scott*, 1 De G. & Sm. 219; *Howe v. H.*, 14 Jur. 359; *Burton v. Mount*, 2 De G. & Sm. 383; *Crowe v. Crisford*, 17 B. 507; *Blann v. Bell*, 5 De G. & Sm. 658, 2 De G. M. & G. 775; *Harris v. Poyner*, 1 Dr. 174; *Hind v. Selby*, 22 B. 373; *Wearing v. W.*, 23 B. 99; *Bowden v. B.*, 17 Si. 65; *Skirving v. Williams*, 24 B. 275; *Boys v. B.*, 28 B. 436; *Re Elmoro's T.*, 6 Jur. (N. S.) 1325; *Thursby v. T.*, 19 Eq. 413.

(*b*) *Bate v. Hooper*, 5 De G. M. & G. 338, 344; *Blann v. Bell*, 5 De G. & Sm. 658; *Hood v. Clapham*, 19 B. 90; *Pidgeon v. Spencer*, 16 L. T. (N.S.) 83.

(*c*) *Neville v. Fortescue*, 16 Si. 333.

(*d*) *Cafe v. Bent*, 5 Ha. 34; *Morgan v. M.*, 14 B. 85, 86; *Hood v. Clapham*, 19 B. 90.

(*e*) *Caldecott v. C.*, 1 Y. & C. C. C. 312; *Sutherland v. Cooke*, 1 Coll. Ch. R. 498; *Johnson v. J.*, 2 Coll. Ch. R. 441.

(*f*) *Collins v. C.*, 2 My. & K. 703; and see *Bethune v. Kennedy*, 1 My. & C. 114; *Pickering v. P.*, 2 B. 31; 4 My. & C. 289, 300; *Vaughan v. Buck*, 1 Ph. 75; *Oakes v. Strachey*, 13 Si. 414; *Daniel v. Warren*, 2 Y. & C. C. C. 290; *Hubbard v. Young*, 10 B. 203; *House v. Way*, 12 Jur. 958; *Holgate v. Jennings*, 24 B. 623.

(*g*) 4 Ha. 630; and see *Mills v. M.*, 7 Si. 508.

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for life, will show that it was his intention that the tenant for life should enjoy the property in specie. Thus in *Harris v. Poyner* (a), the testator devised and bequeathed all the residue of his real and personal estate, "and all his estate term and interest therein" to trustees in trust for his wife for life, and after her death, he devised "*the same* and all his estate term and interest therein" to his son. *Kindersley*, V.-C., held that the testator intended the son to take the identical property, and, therefore, that during the life of the widow no conversion was to take place (b).

In *Thursby v. T.* (c), a testator seised of real estate, and possessed of leasehold collieries which he was working, by his will devised all his real estate and also all his leasehold estates and all his goods, chattels and credits, and other personal estate to trustees for persons in succession, it was held that a power given to the trustees (amongst others) in case they should deem it beneficial so to do, to continue the collieries and either to increase or abridge the business thereof, and to procure any lease of the collieries to be renewed, and to continue the business after such renewal, was a sufficient indication of intention on the part of the testator, that the tenants for life should enjoy the collieries in specie, especially as the tenant for life of one moiety—an unmarried daughter—had power to appoint any part not exceeding one half of the *rents*, issues and profits, interest, dividends and annual income of her moiety during the lifetime of any husband for his use.

A mere direction postponing the payment of legacies or the distribution of estate until after the death of the tenant for life, will not be a sufficient indication of intention that he is to enjoy the residue *in specie*, inasmuch as such a direction may be taken to refer, not to the management of the property or the securities in which it should be invested, but simply to the postponement as regards the time of the coming into being of the interests respectively created by the will after the death of the tenant for life (d). Nor will the fact that many of the bequests in the will are specific, and require that the subject matter of them should be left *in specie* during the existence of the life estate, lead fairly to any inference that the residuary estate is also to be left *in specie* during the existence of such life estate (e).

(a) 1 Dr. 174.

(b) But see *Lichfield v. Baker*, 2 B. 481; 13 B. 447; *Thornton v. Ellis*, 13 B. 193; *Bowden v. B.*, 17 Si. 63.

(c) 19 Eq. 406.

(d) *Macdonald v. Irvine*, 8 C. D. 101, 123; see also *Blaun v. Bell*, 2 De G. M. & G. 775.

(e) *Macdonald v. Irvine*, 8 C. D. 101, 123, 124.

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A gift to the tenant for life of the income of the testator's "entire estate," will not, it seems, afford an indication of the testator's intention that his property should remain in specie until after the death of the tenant for life, at any rate, where the context shows that those words do not mean "to be kept intact," but are used in their ordinary or popular signification of "all" or "the whole" estate as distinguished from a part of the estate (*a*).

3. Income of Residue as between Legatee for Life and Successors.

Where a residue (*b*) is bequeathed with directions to convert and invest for the benefit of persons in succession and the income before conversion is not expressly or impliedly appropriated, the legatee for life takes the income from the testator's death of such part of the residue as consists of securities authorised by the Court or by the will (*c*). But as to such part of the residue as ought to be converted, the legatee for life will be entitled, from the death of the testator, to the dividend on so much 2½ per Cent. New Consols as could have been purchased with the proceeds of such residue if it had been converted at the end of a year from testator's death (*d*).

Where there is no direction for conversion, and there is an express or implied intention in the instrument that the legatee for life is to take in specie, such legatee will take the whole income (*e*).

And so where there is a direction to convert, but the will shows an intention that until conversion the legatee for life is to take the actual income until conversion (*f*).

Where conversion is directed, and the income in the meantime is to be accumulated, and added to the capital, the accumulation is confined to one year from the testator's death, and from and after

(*a*) *Macdonald v. Irvine*, 8 C. D. 101, 123.

(*b*) As to what is "residue," *Allhusen v. Whittell*, *infra*; *Marshall v. Crowther*, 2 C. D. 199, p. 89, *infra*.

(*c*) *Hewitt v. Morris*, T. & R. 241; *La Terriere v. Bulmer*, 2 Si. 18; *Allhusen v. Whittell*, 4 Eq. 295; *Macpherson v. M.*, 16 Jur. 847; *Caldecott v. C.*, 1 Y. & C. C. C. 312; *Jarman*, (1893) p. 570; *Lewin*, (1891) p. 322.

(*d*) *Dimes v. Scott*, 4 Russ. 195; *Taylor v. Clark*, 1 Ha. 161; *Morgan v. M.*, 14 B. 72; *Allhusen v. Whittell*, 4 Eq. 295; *Re Hill*, 30 L. J. Ch. 551.

(*e*) See the principal case, and *Alcock v. Slopers*, 2 My. & C. 699; cf. *Re Eaton*, 70 L. T. 761.

(*f*) *Mackie v. M.*, 14 B. 72; *Wrey v. Smith*, 14 Si. 202; *Re Sewell*, 11 Eq. 86; *Re Chancellor*, 26 C. D. 42; *Re Crowther*, (1893) 2 Ch. 56; *Re Thomas*, (1891) 3 Ch. 482; and see *Hope v. d'Hedonville*, (1893) 2 Ch. 361 (a case of a settlement); and see *Re Sheldon*, 39 C. D. 51, where the property was permanent though hazardous. As to actual income, see *Re Hubbock*, 100 L. T. J. 86.

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that period the tenant for life is entitled to the interest or rent directed to be accumulated (*a*).

Leaseholds.—Where a tenant for life is entitled to the enjoyment of leaseholds in specie, and they are taken by a public company, and the purchase-money is paid into Court, he is entitled to the same benefit thereout as he would have had from the lease (8 & 9 Vict. c. 18, s. 74), and as leasehold property is of a wearing-out character, it is evident that the mere interest of the purchase-money cannot be considered an adequate compensation to the tenant for life. Thus, in *Jeffreys v. Cunner* (*b*), leaseholds bequeathed to one for life, with remainder over, were taken by a railway company, and the purchase-money was invested in Consols. The tenant for life only received the dividends. It was held that her estate was entitled, out of the Consols, to the difference between the dividends received and the aggregate amount of the rental which would have accrued during her life, if the leaseholds had not been taken (*c*).

Where the tenant for life outlives the term for which he is entitled as tenant for life, he will become absolutely entitled to the whole fund (*d*). In *Askew v. Woodhead* (*e*), a case of a settlement, the C. A. held the legatee for life was entitled to receive an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leasehold had to run (*f*).

When conversion cannot be effected without loss.—Where property given to persons in succession is found by the trustees to be secure, and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate; there the rule is not to convert the property, but to set a value upon it, as at testator's death, and to give the legatee for life 4/ per cent. from the testator's death on such value, and the residue of the income must then be invested, and the income of the investment paid to the tenant for life, but the corpus must be secured for the remainderman (*g*). In *Brown v. Gellatly* (*h*), the testator,

(*a*) *Sitwell v. Bernard*, 6 V. 320; *Jarman*, (1893) p. 372; *Lewin*, (1891) p. 321.

(*b*) 28 B. 328.

(*c*) See also *Re Pileger*, 6 Eq. 426; *Morris v. Hodges*, 27 B. 625; and *In re Money*, 31 L. J. N. S. (Ch.) 496.

(*d*) *Re Beaufoy*, 1 Sm. & G. 20; and see *Phillips v. Sargent*, 7 Ha. 33.

(*e*) 14 C. D. 27.

(*f*) See also *Re Barrington*, 33 C. D. 523; *Re Walsh*, 7 L. R. Ir. 554; *Re*

Wood, 10 Eq. 572; *Re Griffith*, 49 L. T. 161; the Settled Land Act, 1882, s. 34; and *Re Cottrell*, 28 C. D. 628.

(*g*) See *Gibson v. Bott*, 7 V. 89; *Caldocott v. C.*, 1 Y. & C. C. C. 312; *Meyer v. Simonsen*, 5 De G. & Sm. 723; *Arnold v. Ennis*, 2 Ir. Ch. Rep. 601; *Furley v. Hyder*, 42 L. J. Ch. 626; *Re Llewellyn's T.*, *Jarman*, (1893) p. 375; *Lewin*, (1891) p. 324; *Theobald*, 1895) p. 447.

(*h*) 2 Ch. 751.

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Duncan Dunbar, after giving his property to trustees, with full power to realise the same when and in such manner as they might see fit, empowered them to sail his ships for the benefit of his estate, until they could be satisfactorily sold. The ships gained considerable earnings after the testator's death. "With regard to the ships," said Cairns L. J., "the testator has put them simply in the position of property, which was to be converted cautiously, and in proper time, and as to which there was no breach of trust in the executors delaying to convert it, but which was when converted, and when invested, to be enjoyed as the residue of his estate. In that state of things, it seems to me that this case falls exactly within the third division pointed out by *Parker, V.-C.*, in the case of *Meyer v. Simonsen* (a), and that a value must be set upon the ships, as at the death of the testator, and the tenant for life must have 4 per cent. on such value, and the residue of the profits must of course be invested, and become a part of the estate" (b).

Income of Legacies.—The tenant for life is entitled to the income of a fund set aside for contingent legacies (c); but if they are vested, only to the interest of the invested income (d).

Recovered Assets.—Where unconverted property consists of future or reversionary interests, or of a debt, or an annuity for years, or of wasting property, such property when realized should, subject to the terms of the will (e), be apportioned by ascertaining the sum which put out at interest at 4 per cent. (f) per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate, with yearly rests and deducting income-tax, would with the accumulations of interest, have produced the amount actually received; and the sum so ascertained should be treated as capital, and the difference between that sum and the sum received as income (g).

Lost Assets.—The principle applies equally whether there is a loss to be borne or not (h). And semble, it applies to leaseholds (i).

(a) 5 De G. & Sm. 723.

(b) See also *Wilkinson v. Duncan*, 23 B. 469; *Yates v. Y.*, 28 B. 637; *Re Jewell's T.*, 29 B. 171; *Simpson v. Lester*, 4 Jur. N. S. 1269; *Arnold v. Ennis*, 2 Ir. Ch. Rep. 601; *Re Eaton*, 70 L. T. 761; *Re Hill*, 50 L. J. Ch. 551.

(c) *Allhusen v. Whittle*, 4 Eq. 295.

(d) *Crawley v. C.*, 7 Si. 427; *Re Whitehead*, (1894) 1 Ch. 678; cf. *Re Thomas*, (1891) 3 Ch. 482.

(e) *Re Hubbock*, 100 L. T. J. 86.

(f) Semble now, 3 per cent., *Re Goodenough*, (1895) 2 Ch. 537; *Re Cleveland*, ib. 542.

(g) *Beavan v. B.*, 24 C. D. 649 (n.);

Re Chesterfield's T., 24 C. D. 643; *Re Hobson*, 34 W. R. 70; *Wilkinson v. Duncan*, 23 B. 469; *Wright v. Lambert*, 6 C. D. 649; *Cox v. C.*, 8 Eq. 343; *Re Morley*, 13 R. Sept. p. 102.

(h) *Re Foster*, 43 C. D. 629; *Re Godden*, (1893) 1 Ch. 292; *Re Hengler*, (1893) 1 Ch. 586, where the order is given.

(i) *Fearn v. Young*, 10 V. 184; *Morgan v. M.*, 14 B. 72; *Fryer v. Butter*, 8 Si. 442; *Chambers v. C.*, 15 Si. 183; *Sutherland v. Cooke*, 1 Coll. Ch. R. 498; *Crawley v. C.*, 7 Si. 427; *Jarman*, (1893) p. 576.

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Residue.—The legatee for life must keep down the interest on debts, and as between the legatee for life of a residue and the remainderman, there is no residue until debts and legacies are paid, and as between them the rule is that debts and legacies must be taken to have been paid out of such portion of the capital as together with the income of that portion, for one year from the testator's death, is sufficient to make such payment (a).

Apportionment of Gain and Loss.—Where a business was carried on by a receiver for the benefit of two persons as tenants for life successively, at a loss during the life of the first tenant for life, and at a profit during the life of the second tenant for life, the losses will be treated as if they had been debts incurred by the receiver of the business, and will be paid, not out of the capital, but out of the subsequent profits (b).

Shares in Companies.—Where a Company has power to distribute its profits as dividends, or convert them into capital, all persons claiming under the settlor are bound by its exercise (c).

Inquiries.—Inquiries may be directed as to continuing or calling in securities; as to how much of the funds has arisen from interest and how much from capital; as to the value of leaseholds and other property not invested in Consols at testator's death, &c. (d). And before a mortgage security is called in there must be an inquiry whether it is for the benefit of all parties interested that it should be so (e).

4. Duties and Liabilities of Trustees as to Conversion.

Where there is a duty to convert, the rule *primó facie* is that the conversion should take place within the year from testator's death: *Page Wood, L. J.*, in *Grayburn v. Clarkson* (f). As to the investments of trustees and executors authorised by law, see Trustee Act, 1893, Part I.

Executors or trustees neglecting to convert wasting or improper securities bequeathed in succession, and permitting the legatee for

(a) *Lewin*, (1891) p. 322; *Jarman*, (1893) p. 371; *Holgate v. Jennings*, 24 B. 623; *Allhusen v. Whittell*, 4 Eq. 293; *Marshall v. Crowther*, 2 C. D. 199.

(b) *Upton v. Brown*, 26 C. D. 388; and see *Re Millichamp*, 52 L. T. 758; *Gow v. Foster*, 26 C. D. 672; and cf. *Re Chancellor*, 26 C. D. 42; *Re Hill*, *supra*; *Re Crowther*, (1893) 2 Ch. 56.

(c) *Re Malam*, (1894) 3 Ch. 578, *Bouch v. Sproule*, 12 App. Cas. 385, *Re Armitago*, 7 R. 290.

(d) *Seton*, (1893) p. 1316; *Caldecott v. C.*, 1 Y. & C. 312; *Seton*, (1893) pp. 1410, 1414.

(e) p. 75, *supra*; *Beavan v. B.*, 24 C. D. 649 (n.).

(f) 3 Ch. 605; *The Heirs Hiddingh v. De Villiers, &c.*, 12 App. Cas. 624.

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life to receive more than he would have done if conversion had been duly effected, will be guilty of breach of trust (*a*), and will be entitled in passing their accounts to an allowance *only* of the dividends which the legatee for life would have been entitled to if the securities had been converted within a year from the testator's death. If the security, when realised, produces more than it would have produced if sold at the end of the year, they will not be entitled to set off this gain (*b*). But by an inquiry in the same suit they may reconp themselves against the legatee for life the amount overpaid to him (*c*).

(*a*) *Bate v. Hooper*, 5 De G. M. & G. 338.

(*b*) *Dimes v. Scott*, 4 Russ. 195.

(*c*) *Hood v. Clapham*, 19 B. 90; *Tickner v. Old*, 18 Eq. 426; *Graybourn v. Clarkson*, 3 Ch. 605; *Re Llewellyn*, 29 B. 171; *Arnold v.*

Ennis, 2 Ir. Ch. Rep. 601; *Hume v. Richardson*, 10 W. R. 528; *Trustee Act*, 1893, s. 45; *Mara v. Brown*, (1895) 2 Ch., p. 89; and see as to inquiries, *Re Gibson*, W. N., (1884) p. 236; *Seton*, (1893) p. 971.

ASSIGNMENT.

WARMSTREY v. TANFIELD.

4 Car. 1. 1 Ch. R. 29.

Possibility Assignable in Equity.

A grant of a future possibility not good in law, yet a possibility of a trust may be assigned in equity.

THE plaintiff's title appeared to be, that one William Freeman, being possessed of the third part of the parsonage for the whole term to come, granted all his interest therein to one Alborough, in trust for the use of the said William Freeman and Alice his wife, during their lives, and after to the use of such issue male of their two bodies as the said William should by will appoint; and after, the said William appointed the premises after the death of the said Alice unto Richard Freeman, son of the said William and Alice; and that the said interest in law of the said Alborough came by mesne conveyance unto John and Robert Palmer; and that the said Richard Freeman, during the life of the said Alice, who not long after died, assigned the premises unto the plaintiff, and also released to the plaintiff, and the said Palmers assured their interest in law in the said premises to the plaintiff.

The defendant insists, for title, that the said Richard Freeman, about two years after his assignment aforesaid to the plaintiff, made a lease of the premises to Walter Thomas and John Makerith, who passed their estate to one Evans, and Hawkins, in trust for the defendant the Lady Tanfield, and had possession given her.

This Court (a), with the Judges, taking consideration of the said assignments, grants, and release, were of opinion, and declared, that *howbeit a grant of a future possibility is not good in law (b), yet*

(a) Lord Coventry was Lord Keeper.

(b) See *Lampet's case*, 10 Co. 47a, 48b.

Warmstrey v. Tanfield.

a possibility of a trust in equity might be assigned, and the said Richard Freeman's assignment of his said trust unto the plaintiff is also confirmed by the assignment of the said Palmer, who had the interest in law, and the said plaintiff's assignment is also precedent to the deed made to the said Thomas, by which the said defendant, the Lady Tanfield, claimeth the said lease.

ROW v. DAWSON.

1749. 1 V. 331 (a).

Chose in Action Assignable in Equity.

A. borrows money of B., and gives him a draft upon a fund due to him (A.) out of the Exchequer, which was deposited with the officer from whom the fund was payable. A. afterwards becomes bankrupt; this is an assignment thereof to B. for valuable consideration, which shall prevail against the general assignees under the commission of bankruptcy.

A chose in action, though not assignable at law, is assignable in equity, and no particular form of words is necessary.

TONSON and Conway lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz., "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson and Conway, value received.

Gibson became bankrupt; and the question was whether the defendants Tonson, and the executors of Conway, were first entitled by a specific lien upon this sum due to the estate of Gibson; or whether the plaintiffs, the assignees under the commission, are entitled to have the whole sum paid to them; it being insisted for them, that this draft was in the nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of the bankruptcy, in law or equity.

LORD CHANCELLOR HARDWICKE.—At first I a little doubted about my own jurisdiction, and whether the plaintiffs ought not to have gone into the Exchequer, as being a Court of revenue; for this is not a personal credit given to, or demand upon the officer, but to

(a) Reg. Lib. 1749, B., fol. 89.

Row v. Dawson.

be paid out of that money issued out of the Exchequer to the officer ; and this is on warrant, to be paid out of the revenue of the Crown for public services. But there is something in the present case delivering it from that : the officer admits he has received a sum of money applicable to this demand, which brings it to the old case of a liberate (a), which a person has under the Great Seal for the payment of money ; upon admission that the officer had money in his hands applicable to the payment, and proof thereof, that would give Courts of law a jurisdiction, so that an action of debt might be maintained on the liberate.

This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft, not to pay *generally*, but out of this *particular fund*, which creates no personal demand ; therefore, not a draft on personal credit, to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. The first case of which kind, I remember to have been determined in B. R. not to be a bill of exchange, was a draft by an officer on the agent of his regiment, to be paid out of his growing subsistence. Then what is it, for it must amount to something ? *It is an agreement, for valuable consideration beforehand, to lend money on the faith of being satisfied out of this fund ;* which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, *it is a credit on this fund, and must amount to an assignment of so much of the debt :* and, though the law does not admit an assignment of a chose in action, this Court does ; and any words will do, no particular words being necessary thereto.

In the case of a bond, it may be assigned in equity for valuable consideration, and good, although no special form used. Suppose an obligee receives the money on the bond, and there is wrote on the back of it, "Whereas I have received the principal and interest from such a one, do you the obligor pay the money to him." This is just that case ; only it is not a debt arising from specialty : therefore, like

(a) A writ that lay for the payment of a yearly pension or other sum of money, granted under the Great Seal, and addressed to the Treasurer and Chamberlain of the Exchequer.

Row v. Dawson.

an assignment of rent, by direction to a tenant or steward to pay so much of a year's rent to a third person.

The case of *Ryoll v. Rowles* (a), now under the consideration of the Court, occurred to me. There the assignment of debts, of which no possession, came in question; but those are debts depending on partnership, and mentioned there how far the assignment of a bond should be supported against the assignees under the commission; and it is clear that they have been supported where the bond has been delivered over; but if not, some doubt has been, whether it should be supported on the foot of the clause (10 & 11) in the statute, 21 Jac. 1, c. 19.

But this is clear of that doubt, because this was a debt due to Gibson without any specialty. This draft, which amounts to an assignment, *is deposited with the officer* Swinburn, and therefore it attached immediately upon it; so that Swinburn could not have paid this money to Gibson, supposing he had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment, for valuable consideration.

(a) 1 V. 348. See next page.

RYALL *v.* ROWLES.

1747-1750. 1 V. 348.

Assignment of Debts without Notice to Debtor, Invalid against Assignees in Bankruptcy.

Assignee by way of mortgage of goods and chattels, or choses in action, allowing the assignor to continue in the possession or in the order and disposition of them, will, upon the construction of 21 Jac. 1, c. 19, ss. 10, 11 (*a*), have no specific lien on them against his assignees in bankruptcy.

WILLIAM HARVEST, a trader within the several statutes concerning bankrupts, in June, 1732, borrowed from Benjamin and Joseph Tomkins 1,500*l.*, and, as a security, conveyed and assigned his dwelling-house and brew-house at Kingston, and all the coppers and utensils in trade belonging thereto, by way of mortgage, subject to redemption.

He afterwards took Jonathan Stephens into partnership with him, and in less than a month after the partnership, December 22, 1736, made a second mortgage to Potter, in trust for Jonathan Stephens, of his moiety of not only the utensils, but the stock in trade, *debts, profits, &c.*, for securing a sum of money then lent to him by Jonathan Stephens, and any future sums that should be lent.

December 10, 1737, he made a third mortgage of the seventh part of his undivided moiety of all the stock in trade, utensils, *debts due or to grow due*, to Sir James Reynel.

April 24, 1738, he made a fourth mortgage of the seventh part of his undivided moiety, with the same description, to Skip.

September 7, 1738, he made a fifth mortgage to Jonathan Stephens, for securing to him 2,000*l.*, which Stephens had paid to one Baugh, who had the original mortgage on the freehold estate;

(*a*) Repealed, but, with some modifications, re-enacted. See note, post, and 46 & 47 Vict. c. 52, s. 44; Yate, *Bankruptcy*, 1891, pp. 264, 370, 374.

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the real premises, which were conveyed by way of lease to Tomkins having been mortgaged to Philip Stone in 1725, and assigned to Baugh, who assigned to Stephens upon being paid the 2,000*l*.

He afterwards made a sixth mortgage to George Harvest, his son, of the seventh part of his undivided moiety of the partnership, stock-in-trade, *debts*, utensils, and *profits*, in consideration of a sum of money lent.

Notwithstanding these several mortgages, *he continued in possession of the utensils and stock-in-trade as before*, altered, disposed, and mortgaged them as his own, and *received the debts in partnership* with Stephens, without any control from any of the mortgagees till 1740, when he failed and became bankrupt.

Then the assignees and mortgagees insisted on the right to the several goods, stock, &c., comprised in their several assignments, in opposition to the general creditors claiming under the commission.

The cause was heard before Lord Chancellor *Hardwicke*, the Seal after Michaelmas, 1747, and it being a new case, his Lordship ordered it to be argued by two counsel on each side, assisted by the Judges (*a*).

Solicitor-General (the Hon. William Murray (*b*)), and Mr. Noel, for the assignees under the commission.

Attorney-General (Sir Dudley Rider) and Mr. *Wilbraham* for all the mortgagees.

[The judgments of *Burnett*, J., *Parker*, C. B., and *Lee*, C. J., are omitted.]

LORD CHANCELLOR HARDWICKE.—I am obliged to the Judges for their assistance and endeavours to give light in so intricate a case, which intricacy arises in respect of the want of a number of authorities as to the construction of this Act of Parliament, though made so long ago. But a greater intricacy occurs in respect of the conduct of William Harvest, in making these securities. All the authorities giving light to this have been exhausted by the Judges, and it would be mis-spending of time to repeat what has been said. It is sufficient, therefore, to say, I concur in the opinion delivered; but as this

(*a*) Feb. 24, 1747-8.

(*b*) Afterwards Lord Mansfield.

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is a case of great expectation and consequence, I will reduce the grounds to some general principle. • • •

Choses in action are properly within the description of goods and chattels within this clause (a); and I will only add one argument, for the sake of which I mention it, which is, that this construction is strongly warranted by the next preceding clause, relating to bankrupts who by fraud make themselves accountants to the king, to defeat their private creditors, which plainly shows that the words *goods and chattels*, as used in this Act, take in all kind of personal property of the bankrupt, whether in possession or action only, which strongly supports the construction made by the Judges, and is agreeable to *Ford and Sheldon's Case*, 12 Co. 1, where it is held, that, in an Act of Parliament, *goods and chattels* take in *choses in action*. The reason of the other opinion in the books arises from hence, that this question has arisen on a grant or assignment, or bargain and sale, not being such goods and chattels as would pass by that assignment or conveyance; but in an Act of Parliament, which can pass anything, they are always included.

I go on four general principles in the construction of this Act.

First, the aim and intent of the legislature was, that an equal proportion of the effects of the bankrupt among his creditors should be attained as far as possible.

Secondly, that, to attain that end, these Acts of Parliament should be construed beneficially for the general creditors under the commission; and therefore it is, in an unusual manner, different from most Acts of Parliament, enacted, that all these statutes and laws shall be largely and beneficially construed for the creditors in general under the commission.

Thirdly, it appears, the general view and intent of the provision now under consideration was, to prevent traders from gaining a delusive credit, by a false appearance of substance to mislead those who should deal with them.

Fourthly, the legislature judged they might do this by subjecting all the goods of the bankrupt, though conveyed to others, to the general creditors under the commission, because, where the vendee or assignee leaves such goods in possession of the bankrupt as owner, he confides as much in the general credit of the bankrupt as that creditor

(a) See p. 96, *supra* (n.).

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who has only taken his bond or note. It is, in such case, put in the power of the bankrupt to sell the goods the next day; the former assignee could only have a personal remedy against the bankrupt.

All these grounds go to the substance of the case, and not upon niceties, and hold in case of a mortgage as well as an absolute sale: otherwise it would be contrary to the resolutions of *Stephens v. Sole*, and the opinion of Lord *Cooper* in *Bucknall v. Roiston* (a), and to his implied opinion in *Copenurn v. Gallant* (b), and would overturn this part of the statute, and restrain it to absolute sales. Traders, instead of absolute sales, would then make such mortgages, as there would be a greater opportunity; for traders might mortgage over and over again, as this case is a pregnant instance.

As to the most material and operative expression, the legislature has explained their own sense, by putting the words *true owner* in opposition to *reputed*, not *special owner*; and then these last words can only mean a person, who, by specious acts of possession, order and disposition, gives himself an appearance of property he has not really, (which is the present bankrupt's case,) till the mortgage money is paid.

Then it follows that the mortgages to Reynel, Skip, and George Harvest, and so much of the assignment to Stephens as relates to the utensils not fixed to the freehold, which are made a further security to him, must be void within this clause, so far as they are claimed to be specific liens.

The distinction endeavoured has been answered; and the distinction most laboured, that a share of a partner in a partnership stock is only a sort of proportion arising on the balance of the partnership account, and incapable of being delivered, would let in that false, delusive credit (intended to be prevented) in all trades in partnership, and would extend to particular goods in partnership.

As to choses in action comprised in these securities, where it is admitted none could pass but in equity, equity ought to follow the law in this case, if in any. Where property is established by Act of Parliament, equity follows it in like manner as where established by common law; for if not, it would cause great confusion; and it is always so taken on Acts of Parliament made concerning real and

(a) Pr. Ch. 285.

(b) 1 P. W. 314.

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personal estate, regulating that kind of property; for which there is a strong instance in the statutes relating to Papists; for, though subject to penal laws, equity regulates in the same way, by the same rule, as the statutes lay down concerning legal property.

The third and last point is in the construction of Potter's mortgage, which is said to be directly as if made to Stephens; and, I think, upon the whole, it would be so; though, perhaps, if it was nicely scrutinized, some difference might be taken; but whatever legal interest, that vested in Potter. And the law would not have taken notice of the trust if the question was at law; and, therefore, if this Act of Parliament has made it void at law, this Court would never set it up contrary to law for the sake of Stephens, because he was a partner, but would let the law take place for the benefit of the general creditors. As to any of these goods in that mortgage, which equity only could pass, equity will follow the law; for as to the profits arising from trade and choses in action, there could not be an equity upon an equity: equity would vest them in Stephens, and it would undoubtedly be considered as if the assignment had been directly to Stephens. And here the principal objection arises; it being said, it vested in Stephens as to these particulars, and that Stephens was partner then, and if he had not taken this mortgage, he would be entitled to have an allowance out of what would be coming to Harvest's moiety, and would have a specific lien on that moiety; and therefore Stephens, taking a mortgage of the other's share, would not be put in a worse condition than without it. This was the most plausible thing urged for the defendant, and would be right if the foundation was right; but I dispute the foundation, which must be that the party so lending gains a special lien on the partner borrowing, and should be allowed a preference to his separate creditors; but for this there is no authority or precedent after a bankruptcy; it is a different consideration, what a Court of equity might do between the parties themselves, which both remained capable of transacting for themselves. But I might carry it farther; for it is so after the death of a partner, where his effects come to be distributable as assets. In the case of *Meliorucchi v. Royal Exchange Assurance Company* (a), the points determined are not

(a) 1 Eq. Ca. Abr. 8, pl. 8.

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material to the present ; but there the attempt made was to subject stock after a bankruptcy to a debt contracted to the Company by a loan of money, and arguments were drawn from rules concerning partnership ; but it was not contended for, that in case of a partnership, that could be carried farther. And the case cited, of *Croft v. Pike* (a), is as strong as any negative authority can be ; for there it was not attempted to give the surviving partner a right of retainer, or bringing into the partnership account a bond debt, so as to be preferred to others, but only as executor ; and therefore the money taken by deceased partner out of the partnership stock, was allowed to be brought into the partnership account, but the bond debt was not, because a separate loan and transaction. If, then, by a new determination now, it should be admitted, and that one partner, by lending money to another in a separate capacity, not relative to the partnership, should gain a specific lien on the effects of the partner so borrowing, it would open a door to fraud, and so defeat this statute ; for then a person might be taken in as a partner into a moiety of a great stock and flourishing trade, and he may have a separate credit on that confidence, and yet may not have any in reality of the property in that stock, but the whole may belong to others ; which tends plainly to great fraud and imposition on traders and great mischief. It has been said, that great mischief might arise to trade and credit from such a determination as this, as tending to prevent making use of that credit persons have to support themselves in trade, as they cannot make a security without exposing their circumstances to the world ; and on the other hand it is contended, that the other construction would in fact repeal the Act of Parliament, and let in a mischief. Some inconvenience might perhaps arise from a determination of this case on either side ; but I agree with Chief Justice *Lee*, that, as this is a law, we must adhere to it, and while it is a law, be bound by it, and if any inconvenience results from it, that is for the consideration of the legislature. But this I will say, that, as some inconvenience may be to particular persons on one hand, great inconvenience may be on the other, by creating that appearance, as having the substance of which they remain in possession, though they have not at all the real property ;

(a) 3 P. W. 180.

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and that this was the intent of the legislature, I am clear; and I may go so far as to say, that the simplicity of those times did not let in these large and airy notions of credit, as of late, which from the number of bankruptcies we have had of late years, is rather an evidence that the departing from the rule this law has laid down, and giving way to these notions, has been rather a mischief.

I agree, then, that these mortgages cannot prevail as specific liens and securities; therefore, as to the mortgages of lands and fixtures, they are not affected by the Act of Parliament: but what is affected by the direction therein is the assignment to Stephens (for Potter must be considered as a trustee for him) relating to any utensils not fixed to the freehold. So also are all the four mortgages of seventh part, by reason of the bankruptcy of William Harvest, made void by the statute, and can create no specific lien on the bankrupt's share of partnership stock, debts, and effects; but they must be considered only as general creditors.

NOTES.

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1. Generally.

"The great wisdom and policy of the sages and founders of our law," says *Coke*, "have provided, that *no possibility, right, title, nor thing in action, shall be granted or assigned to strangers*, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice" (*a*). "But the origin of the doctrine is better explained as a logical consequence of the archaic view of a contract, as creating a strictly personal obligation between the creditor and the debtor" (*b*).

(*a*) 10 Co. 48. See *Lampet's Case*, 10 Co. 47.

(*b*) *Pollock, Contracts*, 1894, p. 204.

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However, it has been long established that the assignee of such things must at common law sue for them not in his own name but in the name of the assignor (a).

The king was always an exception to the rule laid down by Coke, for he might always either grant or receive a possibility or chose in action by assignment (b).

In equity, from a very early period, assignments of a mere naked possibility, or of a chose in action *for valuable consideration*, have been held valid. "Such an assignment," observes Lord Hardwicke, "always operates by way of agreement or contract, amounting, in the consideration of the Court, to this, that one agrees with another to transfer and make good that right or interest: and, like any other agreement, the Court will cause it to be specifically performed, not leaving the assignee to his action for damages when the assignor is in a condition, to transfer the property, or to cause it to be transferred, to his assignee" (c).

"An assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done" (d). "Whenever persons agree concerning any particular subject, that, in equity, as against the party himself and any claiming under him, voluntarily or with notice, raises a trust" (e). The doctrine, however, of equitable charges does not rest upon specific performance, and the doctrines relating thereto do not afford a test or a measure of the rights created (f).

Where an equitable assignment was made of property recoverable in Courts of equity, hence called *choses in equity*, such as the beneficial interest in personalty under a will or intestacy, stock standing in the names of trustees, or in the Court, money in Court, judgments enforceable in equity, the beneficial interest in a legal debt assigned to trustees, &c., the assignee could sue in his own name *in equity* for such property; but where there was an *equitable* assignment

(a) *Ibid.* 203.

(b) Co. Litt. 232 b, n. 1; Miles v. Williams, 1 P. W. 252; Stafford v. Buckley, 2 V. 177, 181.

(c) Wright v. W., 1 V. 412; Carleton v. Leigh, 3 Mer. 671.

(d) Per Lord Macnaghten, Tailby v. O. Receiver, 13 App. Cas., 546.

(e) Thurlow, C., Legard v. Hodges, 1 V. jun. 478.

(f) Tailby v. O. R., *supra*, commenting upon judgment of Lord Westbury in Holroyd v. Marshall, 10 H. L. Cas. 191; and see Western Waggon, &c., Co. v. West, (1891) 1 Ch. p. 273.

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made of things only recoverable at law—commonly called *choses in action*—the assignee could not sue in his own name, but he was obliged to do so in the name of the assignor, whom a Court of equity would compel to allow his name to be used for that purpose.

In process of time, some *choses in action* became assignable at law, either by custom, as bills of exchange; by statute, as promissory notes, 3 & 4 Anne, c. 9, 7 Anne, c. 25; bail, 4 Anne, c. 16, s. 20, and replevin, 11 Geo. 2, c. 19, bonds; railway, 8 & 9 Viet. c. 19, administration, 20 & 21 Viet. c. 77, ss. 81, 83, and exchequer (*a*) bonds; bills of lading if endorsed, 18 & 19 Viet. c. 111; East India Bonds, 51 Geo. 3, c. 64, s. 4; mortgage debentures issued by the Land Companies under the Mortgage Debenture Act, 1865, 28 & 29 Viet. c. 20; things in actions of companies, Companies Act, 1862, ss. 95, 157; transferable debentures under the County Debenture Acts, 1873; policies of life assurance, 30 & 31 Viet. c. 144 (*b*); and policies of marine insurance (*c*); the choses in action of bankrupts (*d*); and in all these cases the assignee might sue at law in his own name. And recently by the Supreme Court of Judicature Act, 1873, s. 25, ss. 6, any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other persons therein mentioned, is made assignable at law by an *absolute assignment* in writing, under the hand of the assignor, *not purporting to be by way of charge only* (*e*).

When *choses in equity* or *choses in action* are assigned, irrespective of any statute, it is obvious that it is necessary to give the trustees or other persons holding the funds, or the debtors, notice (*f*) of the assignment, in order to prevent their paying the same to the assignor, and in the cases of successive incumbrances notice is necessary, in order that any person about to advance money upon such security might ascertain whether there was any prior incumbrance thereon, and a person who advanced his money upon the security of an assignment of a *chose in equity* or a *chose in action*, who by neglecting to give notice to the trustee or debtor of such assignment, was the cause of another person advancing money upon the same

(*a*) *Vertue v. East Angl.*, 5 Ex. 280.

(*b*) *Scottish, &c., L. A. S. v. Fuller*, 2 Eq. 58; *Newman v. N.*, 28 C. D. 674.

(*c*) 31 & 32 Viet. c. 86; see *Lloyd v. Fleming*, 7 Q. B. 299; *North of*

England, &c., Co. v. Archangel, &c., Co., 10 L. R. Q. B. 249.

(*d*) 32 & 33 Viet. c. 71, s. 111; and see *Add. Contracts*, (1892) p. 204.

(*e*) See *Annual Practice*, Part I.

(*f*) See *Notice, &c.*, p. 118, *infra*.

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security, was in such case justly postponed to the second incumbrancer.

As the assignment of *equitable choses in action* does not appear to have been altered by the Judicature Act, and as *legal choses in action* only come within it when the assignment is of the character and made in the mode there pointed out, it is still necessary to examine the law as to the assignment of equitable and legal choses in action, both irrespective of and under the Judicature Act, 1873.

2. What might be Assigned in Equity though not at Law.

Mere contingent interests (*a*), or expectancies, as that of an heir at law to the estate of his ancestor (*b*); the interest which a person may take under the will of another then living (*c*); or under marriage articles (*d*); or the share to which such person may become entitled under an appointment (*e*); or an interest in money which may come to a person under a discretionary power in trustees to allow him maintenance (*f*); or in personal estate, as presumptive next of kin of a person then living (*g*), is assignable in equity for valuable consideration; and when the expectancy has fallen into possession, the assignment will be enforced; and see Story, Eq. (1892), p. 900.

Non-existing Property (cf. (n.) p. 113).—Non-existing property, to be acquired at a future time, though not assignable at law (*h*) is clearly so in equity; the assignment, for instance, of future freight (*i*), of future patent rights (*k*), of profits arising from the working of a patent by licensees (*l*), of future dividends upon proof in bankruptcy (*m*), of the future cargo of a ship (*n*), of building materials to be brought on premises (*o*), or machinery at a future time to be added

- (a) *Wind v. Jekyl*, 1 P. W. 572.
- (b) *Hobson v. Trevor*, 2 P. W. 191; *Wethered v. W.*, 2 Si. 183, 192; *Smith v. Baker*, 1 Y. & C. C. C. 229; but see *Carleton v. Leighton*, 3 Mer. 671.
- (c) *Beckley v. Newland*, 2 P. W. 182; *Lyde v. Mynn*, 1 My. & K. 693; *Pope v. Whitcomb*, 3 Russ. 124.
- (d) *Bennett v. Cooper*, 9 B. 252.
- (e) *Musprat v. Gordon*, 1 Anst. 34.
- (f) *Re Coleman*, 39 C. D. 443.
- (g) *Hinde v. Blake*, 3 B. 235; *Meek v. Kettlewell*, 1 Ph. 347.
- (h) *Robinson v. Macdonald*, 5 Mau. & Solw. 228.

- (i) *Brown v. Tanner*, 3 Ch. 597; *Wilson v. W.*, 14 Eq. 32.
- (k) *Printing, &c., Co. v. Sampson*, 19 Eq. 462.
- (l) *Bergmann v. Macmillan*, 17 C. D. 423.
- (m) *Re Irving*, 7 C. D. 419.
- (n) *Re Ship Warre*, 8 Pr. 269 n.; *Curtis v. Auber*, 1 J. & W. 526; *Douglas v. Russel*, 4 Si. 524; *Langton v. Horton*, 1 Ha. 549; *Lindsay v. Gibbs*, 22 B. 522; *Gardner v. Cuzonove*, 1 H. & N. 423.
- (o) *Brown v. Bateman*, 2 C. P. 272.

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to or substituted for existing machinery (*a*), of goods and chattels now being, or which shall hereafter be, in or about a messuage or house (*b*) is valid in equity. An assignment by bill of sale of "all the book debts due and owing, or which may during the continuance of this security become due and owing, to the said mortgagor," is a good assignment, and passes the equitable interest in book debts incurred after the assignment, whether in the business then carried on by the mortgagor or in any other business (*c*). Where a company has power to do so, it can make a valid mortgage of its future or uncalled capital (*d*).

The assignment by a bankrupt of a debt which might become due to the trustee in bankruptcy at a future time, but which was not due to the bankrupt at the date of the assignment, is invalid against the trustee although for value (*e*).

But a debt due at the date of the assignment to the bankrupt may be assigned (*f*).

Choses in action are not within the Bills of Sales Act: see Bills of Sale Acts, 1878, s. 4, 1882, s. 3.

In *Re Davis* (*g*) a lender of goods under an agreement for the hire and ultimate purchase by the hirer, assigned all his rights under the agreement to secure a loan. Held, not a bill of sale, and that the assignment was good against the trustee in bankruptcy of the hirer. If there is an assignment of chattels and an assignment of an agreement by one and the same deed, the assignment is severable (*h*).

A personal licence, *e.g.*, a licence to enter a house and seize goods, cannot be assigned (*i*).

8 & 9 Vict. c. 106.—By section 6 of this statute it was enacted "that, after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift, or limitation of such interest, or possibility, be or be not ascertained; also a right of entry, whether immediate or future, and

(*a*) *Holroyd v. Marshall*, 10 H. L. Cas. 191.

(*b*) *Ex p. Games*, 12 C. D. 314.

(*c*) *Talby v. O. Receiver*, (1888) 13 App. Cas. 523; *Re D'Epineuil* (2), 20 C. D. 758; *Re Turcan*, (1888) 40 C. D. 5; and see *Re Coleman*, 39 C. D. 443.

(*d*) *Re Pyle Works*, (1890) 44 C. D. 534; *Newton v. Debenture Holders*,

&c., 11 T. L. R. 279.

(*e*) *Ex p. Nicholls*, 20 C. D. 782.

(*f*) *Re Davis*, 22 Q. B. D. 193, distinguishing *Ex p. Nicholls*, *supra*.

(*g*) 22 Q. B. D. 193.

(*h*) *Re Isaacson*, (1895) 1 Q. B. 333; *London, &c. Bank v. White*, p. 109, *infra*.

(*i*) See *Re Davis*, *supra*, and *Brown v. Metropolitan, &c., Soc.*, 28 L. J. Q. B. 236, and (*n.*) p. 113, *infra*.

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whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force *only* of this Act, defeat or enlarge an estate tail." It also enacts, that dispositions by married women must be in conformity with 3 & 4 Will. 4, c. 74, and 4 & 5 Will. 4, c. 92; and as to the transfer of rights of re-entry for forfeiture, see Conv. Act, 1881, s. 10, ss. 1.

This Act, it will be observed, does not render assignments of contingent interests, or possibilities *in chancery*, or mere naked possibilities *not coupled with an interest*, valid at law; the exclusive jurisdiction, therefore, of the old Courts of equity as to such assignments was untouched by the Act.

3. What amounts to an Equitable Assignment.

Where a person agrees verbally or in writing to transfer his right to any specified property, which is in existence or which may come into existence, to another person for valuable consideration, an equitable assignment is created. But it is usual, in transferring a chose in action, as a debt or bond, to assign it by a deed in legal form, with a power of attorney to sue in the name of the assignor. No writing is necessary (*a*), unless the agreement to be proved is within the Statute of Frauds (*b*), and any words which show an intention of transferring or appropriating the chose in action to or for the use of the assignee for valuable consideration are sufficient (*c*), and give a good charge on the chose in action (*d*). "The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value in terms present and immediate has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified" (*e*).

(*a*) Gurnell v. Gardner, 9 Jur. N. S. 1220; Riccard v. Prichard, 1 Kay & J. 277, 279; Field v. Mogaw, 4 L. R. C. P. 660.

(*b*) *Ex p.* Hall, 10 C. D. 640, and cf. *Re Richardson*, 30 C. D. 396.

(*c*) Row v. Dawson, p. 93, *supra*.

(*d*) Gorrings v. Irwell, 34 C. D. 134.

(*e*) Per Lord Macnaghten, Tailby v. O. Receiver, (1888) 13 App. Cas. 543; and see Thompson v. Spiers, 13 Si. 469; Burn v. Carvalho, 4 My. &

C. 690; Cook v. Black, 1 Ha. 390; M'Fadden v. Jonkyns, 1 Ha. 458; Malcolm v. Scott, 3 Mac. & G. 29; Myers v. The United, &c., Co., 7 De G. M. & G. 112; Chowno v. Baylis, 31 B. 351; Gurnell v. Gardner, 4 Gif. 626, 680; Frith v. Forbes, 4 De G. F. & J. 409; *Ex p.* Montagu, 1 C. D. 554; Ranken v. Alfaro, 5 C. D. 786; *Re Irving*, 7 C. D. 419; Webb v. Smith, 30 C. D. 192; Stephens v. Green, (1895) 2 Ch. 148.

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Some Cases of Equitable Assignment.—An agreement between a debtor and a creditor that the debt owing shall be paid out of a *specific* fund coming to the debtor (*a*), or an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, will create a binding equitable assignment (*b*), and the consent of the party to whom the order is given is not necessary, *Ibid*.

In *Brice v. Bunnister* (*c*), G. agreed to build a vessel for defendant B., for a price payable in instalments: G. being indebted to plaintiff Brice, ordered and requested defendant B. to pay 100*l.* to Brice out of moneys due or to become due to him, G. Plaintiff gave defendant notice of this. At the time the order to pay was given all the instalments due had been paid to G. Defendant B. refused to be bound by the notice, and afterwards paid the accruing balance to G. Held, a good equitable assignment (*d*).

In *Percival v. Dunn* (*e*), it was held that a similar order not specifying the fund or debt out of which payment was to come was bad. D., the defendant, owed A., a builder, money, payable by instalments. A. gave the plaintiff P., to whom he owed money, an order on D., "Please pay P. the amount of his account, 47*l.*," &c. At the time the order was given to defendant D., he was in debt to A. Held, it did not, for the above reason, operate as an equitable assignment (*f*).

In *Yates v. Groves* (*g*), D. being indebted to Y. and B. upon a note of hand, in September, 1789, they gave up to him the note, upon his giving to them an order, directed to G. and D., who had agreed to purchase some leasehold property of him, D., to pay the amount of the note and interest to B. *out of* the purchase-money. The order was not accepted in writing, although it seems G. and D. verbally agreed that, when the assignments were prepared and the purchase-money was to be paid, B. should receive notice to attend. In December, 1789, the assignments being prepared, B. attended, in

(*a*) *Rodick v. Gandell*, 1 De G. M. & G. 776.

(*b*) *Burn v. Carvalho*, *infra*, p. 109; *Brown & Co. v. Kough*, 29 C. D. 848.

(*c*) 3 Q. B. D. 369.

(*d*) *Supra*, distinguishing *Tooth v. Hallett*, 4 Ch. 242, which was followed in *Er p. Hall*, 10 C. D. 615; *Burn v. Carvalho*, *infra*, p. 109; *Western Wag-*

gon, &c., Co. v. West, (1892) 1 Ch. 271, p. 110, *infra*; *May v. Lane*, 15 R. Jan. 432, reversed 14 R. March, 231, C. A.

(*e*) 29 C. D. 1.

(*f*) See *Harding v. H.*, 17 Q. B. D. 442; but see the letter, *Webb v. Smith*, 30 C. D. p. 194, in which no specific fund was referred to.

(*g*) 1 V. jun. 281.

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consequence of notice; but before the transaction could be gone through, D. went out of the room, and was arrested, and in January, 1790, a commission of bankrupt issued against him. Upon a bill being filed by Y. and B., Lord *Thurlow* held, that the order was an equitable assignment of the purchase-money. "This," said his Lordship, "is nothing but a direction by a man to pay part of his money to another for a foregone valuable consideration. If he could transfer, he has done it; and it being his own money, he could transfer. The transfer was actually made. They were in the right not to accept, as it was not a bill of exchange. It is not an inchoate business. The order fixed the money the moment it was shown to G. and D."

In *Ex p. Alderson (a)*, R., being pressed to discharge a debt on the 5th of August, 1813, gave to two creditors a draft on the executor of a debtor of hers, which draft the executor promised to discharge on receiving assets. A commission of bankrupt issued against R. on 17th of November, 1814. Upon a petition being presented by the two creditors, it was held, that they were entitled to the sum for which the draft was given, as against the assignees. And Lord *Eldon* on the appeal said, that the debtor would be bound by the order being shown to him, and that a contract on his part to pay was, in equity, not necessary.

A mere indorsement in blank of a debenture of a joint stock company has been held a good equitable assignment (b); as to equitable mortgage of shares (c).

Bill of Sale, Equitable Assignment.—In *London & Yorkshire Bank v. White (d)*, F., in conversation with the bank manager, agreed on the 7th of Dec. to assign to the bank, as security for an overdraft, his interest in certain goods then deposited with G. for sale. On the 9th Dec., F. sent a notice to G. that he had assigned his interest in

(a) 1 Mad. 53, affir. 3 Swan. 392.

(b) *Re Pryce*, 4 C. D. 685; *Re Jenkinson*, 15 Q. B. D. 441.

(c) *Colonial Bank v. Whinney*, 11 App. Cas. 426; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

(d) 11 T. L. R. 570. See also the following cases: *Burn v. Carvalho*, 4 My. & C. 690; *Shand v. Du Buisson*, 18 Eq. 283; *Ex p. Montagu*, 1 C. D. 555; *Smith v. Everett*, 4 Bro. Ch. 64; *Ex p. Steward*, 3 Mont. D. & De G. 265; *Diplock v. Hammond*, 2 Sm. & G. 141;

5 De G. M. & G. 320; *L'Estranger v. L'E.*, 13 B. 281; *Riccard v. Prichard*, 1 Kay & J. 277; *Jones v. Farrell*, 1 De G. & J. 208; *Ex p. Imbert*, 1 De G. & J. 152; *Farley v. Turner*, 26 L. J. Ch., N. S. 710; *Rayner v. Harford*, 27 L. J. Ch. N. S. 708; *Chowne v. Baylis*, 31 B. 351; *Langton v. Waring*, 18 C. B. N. S. 315; *Ex p. North Western Bank*, 15 Eq. 69; *Addison v. Cox*, 8 Ch. 82; *Re Nicholl*, 22 C. D. 782; *Brown & Co. v. Kough*, 29 C. D. 848.

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the goods to the bank, and requesting G. to pay the bank the proceeds of sales from time to time, &c. Held, that on the 7th of Dec. there was a complete equitable assignment to the bank, that the notice to G. on the 9th was not necessary to complete the title, and that the notice of the 9th was not a bill of sale.

Where no Equitable Assignment is Created.—The intention, however, to create a charge must be shown. Thus, a mere letter of instruction to a banker not written with any intent to create a charge on a fund in his hands, will not amount to an equitable assignment (*a*). Nor will the opening of a credit for a particular sum constitute an equitable assignment or specific appropriation of that sum, but it is merely an authority to the person in whose favour the credit is opened to draw to the extent of the specified amount (*b*).

Where a person has a fund belonging to another in his hands, a bill of exchange drawn by the latter on the former, although for the exact amount, is not an equitable assignment thereof (*c*): for a bill of exchange is a negotiable instrument free from the equities between the parties, *secus* an equitable assignment (*d*). Nor is a cheque an equitable assignment of the drawer's balance at the bankers upon whom it is drawn (*e*).

Where the property purporting to be assigned is not in the assignor at the time of the assignment, and by some act intervening, such as bankruptcy, never becomes his, there is no equitable assignment. Thus in *Ex p. Hale* (*f*), A. assigned to his bankers future rent not yet due. They gave notice to person from whom such rent would be payable. Before it became payable A. became bankrupt. Held, invalid, on the appeal the judgment in the C. A. turned upon the Statute of Frauds (*g*). So also where the benefit of a contract is assigned which creates no debt present or future. Thus in *Western Waggon, &c., Co. v. West* (*h*), P. assigned to the plaintiffs his right under a mortgage with defendant West to further advances which formed part of the consideration

(*a*) *Hopkinson v. Forster*, 19 Eq. 74; *Schroeder v. Central Bank, &c.*, 34 L. T. 735.

(*b*) See *Morgan v. Larivière*, 7 L. R. H. L. 423; *Twycross v. Dreyfus*, 5 C. D. 614.

(*c*) *Shaul v. Du Buisson*, 18 Eq. 283.

(*d*) See judgment of *Fry, L. J.*, in

Brown, Shipley & Co. v. Kough, 29 C. D. 875.

(*e*) *Hopkinson v. Forster*, 19 Eq. 74, commenting on *Keene v. Beard*, 8 C. B. N. S. 372.

(*f*) 10 C. D. 615.

(*g*) *Re Nicholl*, 22 C. D. 782, and *Re Davis*, *supra*, p. 106.

(*h*) (1892) 1 Ch. 271.

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for such mortgage. The plaintiffs gave defendant notice of the assignment, but they, in forgetfulness, made a further advance of 500*l.* to P. Held, that as the contract in the mortgage deed was not a contract to lend out of a particular fund, no money or fund was bound by it, and that no debt was created by it, and that the 500*l.* was therefore never bound in the hands of the defendant W., although it would be in the hands of P. Also, that the plaintiffs could only sue for damages in right of P., and that P. had sustained none (*a*).

A mere mandate from a principal to his agent, not communicated to a third person, will give the third person no right or interest in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it (*b*). Where, for instance, an order is given by a man to his bankers to pay over a sum to a third person to whom the order is not communicated, and the banker does not make the payment, and the order is afterwards countermanded, the third party cannot insist on the banker paying to him the money (*c*). So a letter to a tenant to pay rent to his bankers amounts only to a revocable authority, which authority will be revoked by the bankruptcy of the writer of the letter (*d*). In *Re Russell* (*e*), A., entitled to the balance of an unpaid legacy in the hands of the executors, wrote a letter at the request of B. to his own solicitor, directing him to pay such balance to B., which letter was sent to the executors, and they paid the balance to B. four days after A.'s death. B. afterwards returned the money to the executors. Held the letter was merely a direction, and not an equitable assignment, and that it was revoked by A.'s death (*f*). And as to letters of advice accompanying a bill of exchange, see judgment of *Chitty, J.*, in *Brown, Shipley & Co. v. Kough* (*g*). When, however, the agent communicates the mandate to the third person, and agrees to exercise it for his benefit, he converts himself into an agent for, and debtor to, the persons in whose favour the mandate was given. Thus, in *Fitzgerald v. Stewart* (*h*), consignments had been made from abroad to answer an annuity which the owner of the property consigned was liable to pay, and the consignee in this country gave notice of the

(*a*) See also *May v. Lane*, cited (*d*) p. 108, *supra*.

(*b*) *Scott v. Porcher*, 3 Mer. 652, 664.

(*c*) *Morrell v. Wooten*, 16 B. 197.

(*d*) *Ex p. Hale*, 10 C. D. 615.

(*e*) 37 Sol. Jo. 212; cf. *Lambe v. Orton*, 1 Dr. & Sm. 125.

(*f*) And see *Lambe v. Orton*, *supra*.

(*g*) 19 C. D. 858.

(*h*) 2 Russ. & M. 457.

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arrangement to the annuitant, and made payments in pursuance of it, it was held by *Brougham, C.*, that the consignee was not afterwards at liberty to discontinue such payments, so long as he had any proceeds of the consignments in his hands.

A mere power of attorney or authority to a person to receive money not addressed to the debtor, and directing such person to pay it to a creditor of the party granting the power or authority, will not amount to an equitable assignment. Thus, in *Rodick v. Gandell (a)*, a railway company was indebted to the defendant, their engineer, who was greatly indebted to his bankers. The bankers having pressed for payment or security, the defendant, by letter to the *solicitors of the company*, authorized them to receive the money due to him from the company, and requested them to pay it to the bankers. The solicitors, by letter, promised the bankers to pay them such money on receiving it. It was held by *Truro, C.*, affirming the decision of Lord *Langdale, M. R.*, that this did not amount to an equitable assignment of the debt. "If," said his Lordship, "an assignment of the debts had been intended, it would have been quite as easy to have directed the order to the railway company as to the solicitors. It rather seems to have been intended that the bank should have no title or interest in the debts until the amount of the debts should have been adjusted, and some definite portion been adjusted and realized" (b).

A mere representation, by the drawer, that bills of exchange will be met by the drawee, inasmuch as the drawee has larger funds in his hands belonging to the drawer, will not amount to an equitable assignment or specific appropriation of such funds (c).

A promise to pay money when the debtor receives a debt due to him from a third person does not constitute an equitable assignment, so as to charge the debt in the hands of such third person (d).

Where an instrument was construed, not as a mere equitable assignment, but as an order for payment of a sum of money *out of a particular fund*, unless it were stamped as required by 55 Geo. III. c. 184, Sched. Part 1, tit. "Inland Bill," it could not be enforced in

(a) 1 De G. M. & G. 763; 12 B. 325.

(b) See also *Bell v. The London & N. W. R. Co.*, 15 B. 548; *Thayer v. Lister*, 30 L. J. Ch. N. S. 427; *Flint v. Walker*, 5 Moo. P. C. C. 179; *Re Foster*, 7 Ir. R. Eq. 294.

(c) See *Thompson v. Simpson*, 5 Ch. 659; *Citizen's Bank, &c. v. First National Bank, &c.*, 6 L. R. H. L.

352; *Brown, Shipley & Co. v. Kough*, 29 C. D. 848.

(d) *Field v. Megaw*, 4 C. P. 660. See also *Malcolm v. Scott*, 3 Ha. 39; *Robey, &c., Ironworks v. Ollier*, 7 Ch. 695; *Phelps & Co. v. Comber*, 29 C. D. 813; *Brown, Shipley & Co. v. Kough*, 29 C. D. 848; *Jones v. Starkey*, 16 Jur. 510.

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equity (a): but where an instrument, though in form an order for the payment of money, operated as an equitable assignment, if properly stamped as an assignment, it would be received by the Court (b). The result seems to be that such an order is liable under the Stamp Act, 1891, to a 10s. stamp as a "conveyance, &c. not hereinbefore described" (c).

A covenant to charge, or dispose of, or affect *lands* hereafter to be acquired, operates in equity upon lands so afterwards acquired (d), but no charge will be created except where the covenant refers to particular property, or where property has been acquired with an intention to perform or satisfy the covenant (e).

A covenant in a marriage settlement to settle or charge after-acquired as well as present personal property, will operate in equity to bind such property even as against creditors (f), subject, however, to the provisions of the Bankruptcy Act, 1883, s. 47. And the whole future property of the covenantor must not be included therein (g).

After-acquired Property (cf. (n.) p. 105).—Although a mere contract may amount to an actual assignment, it must purport to confer an interest in the future chattels immediately by its own force, and without the necessity of any further act on the part of the assignee upon the future chattels coming into existence, and therefore an assignment of existing chattels, coupled with words which amount to a mere licence to seize after-acquired property, will not be construed as an equitable assignment of the latter (h).

(a) *Braybrooke v. Meredith*, 13 Si. 271; *Parsons v. Middleton*, 6 Ha. 261; and see *Pott v. Lomas*, 6 H. & N. 529.

(b) *Diplock v. Hammond*, 5 De G. M. & G. 320; *McGowan v. Smith*, 26 L. J. N. S. (Ch.) 8; *Brice v. Bannister*, 3 Q. B. D. 569; *Ex p. Hall*, 10 C. D. 615; and *Buck v. Robson*, 3 Q. B. D. 686, and the observations therein, disapproving of *Ex p. Sheldard*, 17 Eq. 109; *Adams v. Morgan*, 14 L. R. Ir. 140; *Fisher v. Calvert*, 27 W. R. 301; *Webb v. Smith*, 30 C. D. 192.

(c) See *Alpe*, Stamp Duties, 1894, p. 77.

(d) *Metcalfe v. York*, 1 My. & C. 547; *Lyde v. Mynn*, 1 My. & K. 683;

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Wellesley v. W., 4 My. & C. 579.

(e) *Mornington v. Keane*, 2 De G. & J. 292; *Roundell v. Breary*, *ib.*, 319; *Cleary v. Fitzgerald*, 5 L. R. Ir. 351.

(f) See *Lewis v. Madocks*, 8 V. 150, 7 R. R. 10, 17 V. 48; *Lyster v. Burroughs*, 1 Dr. & W. 149; *White v. Anderson*, 1 Ir. Ch. R. 419; *Stack v. Royse*, 12 Ir. Ch. R. 216; *Galavan v. Dunne*, 7 L. R. Ir. 144; *Bolding v. Read*, 3 H. & C. 955; *Re D'Epineuil* (2), 20 C. D. 758; *Tailby v. O. Receiver*, 13 App. Cas. 523; *Re Turcan*, 40 C. D. 5. See *vide Ex p. Bolland*, 17 Eq. 117.

(g) *Mitchell v. Reynolds*, 1 P. W. 181, *Smith's Leading Cases*.

(h) *Roe v. Whitmore*, 4 De G. J. & S. 1; *Brown v. Bateman*, 2 L. R.

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Where a person gives as security for a debt, an actual assignment (*a*), or a covenant or undertaking to assign (*b*) after-acquired property, if the assignor obtains his discharge in bankruptcy before the property comes into existence, the right thereto will go with the debt. In *Collyer v. Isaacs* (*c*), a debtor by bill of sale assigned for value to a creditor, certain specified chattels at his place of business, "and all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof." The debtor became bankrupt, and after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bankruptcy. It was held by the C. A., that the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign, for the breach of which the assignor incurred a liability provable in his bankruptcy, and from which he was released by the order of discharge; that consequently the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale (*d*).

Policies of Life Assurance.—Before the Act of 1867, 30 & 31 Vict. c. 144 (infra, p. 138), a policy could not be assigned at law, but all the benefit of the policy monies could be given to another person by the policyholder by the execution of a declaration of trust (*e*). Where a life policy which was to become void, if the assured should commit suicide, unless the policy should have been "legally assigned," had been deposited to secure a sum of money, it was held to be a sufficient assignment to come within the exception, and that notice of it to the office was unnecessary (*f*), where a letter charging the policy was held to be sufficient for the same purpose.

In *Re Turcan* (*g*), T. on his marriage covenanted to settle his estate or interest in any property or estate to which he should become possessed or entitled during the marriage by devise, bequest, purchase or otherwise. He effected some policies, one of which was subject to a condition that it should not be assignable in any way whatever. Held that the covenant was divisible, that A. had become possessed of "property" by purchase, within the covenant, that the condition in

C. P. 272, 283, 284; and see *Re Davis*, 22 Q. B. D. 194, and (n.) "Non-existing," &c., p. 105.

(*a*) *Colo v. Kernot*, 7 L. R. Q. B. 534, n.

(*b*) *Thompson v. Cohen*, 7 L. B. Q. B. 527; *Cole v. Kernot*, supra.

(*c*) 19 C. D. 343.

(*d*) And see *Ex p. Nichols*; *Re Davis*, cited p. 106.

(*e*) See *Re Turcan*, 40 C. D. p. 10, and infra.

(*f*) *Dufaur v. The Professional L. A. O.*, 25 B. 599; and see *Jones v. The Consolidated A. Co.*, 26 B. 256.

(*g*) (1888) 40 C. D. 5.

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the policy was intended only to prevent A. from assigning the policy at law, and that the moneys passed to the trustees.

4. Notice, Distringas, Stop Orders, &c.

Notice of an assignment is not necessary to render it perfect *as between the assignor and assignee*, whether it be for valuable consideration (a), or only voluntary (b). It does not render the title perfect, for it was not even a step in the title before *Forster v. Cockerell*, and it does not require registration as a bill of sale (c).

Nor is notice necessary as against third parties who stand in the same position as the assignor, as, for instance, persons claiming under a subsequent assignment as volunteers (d), a creditor under a judgment who had obtained a charging order (e), or as against a judgment creditor who has got a receiver appointed (f), or under a garnishee order under the C. L. P. Act, 1854 (g).

The neglect, however, to give notice, or to obtain what is equivalent thereto, a distringas, or a stop-order, may have the effect, 1st, of rendering subsequent payments to the assignor valid; 2nd, of enabling a subsequent purchaser or incumbrancer to gain priority by giving notice; 3rd, of bringing the subject-matter assigned within the operation of the reputed ownership clause of the Bankruptcy Act.

Neglect by assignee to give notice renders subsequent payment to assignor valid.—Where the assignee does not give notice of the assignment to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, he will be obliged to allow the payments which such debtor, trustee, or person subsequently makes to the assignor (h).

(a) *Burn v. Carvalho*, 4 My. & C. 702; *Dufaur v. Professional L. A. Co.*, supra, 599; *Rodick v. Gandell*, 1 De G. M. & G. 780; *Re Lowes' S.*, 30 B. 95; *Goringo v. Irwell*, 34 C. D. 129.

(b) *Donaldson v. D.*, Kay, 711; *Roberts v. Lloyd*, 2 B. 376; *Re Way's T.*, 2 De G. J. & S. 365.

(c) See judgment of Lord Macnaghten, *Ward v. Duncombe*, (1893) A. C. p. 392; *London, &c. Bank v. White*, p. 109, supra.

(d) *Justice v. Wynne*, 12 Ir. Ch. Rep. 289.

(e) *Beavan v. Oxford*, 6 De G. M. &

G. 492; *Kinderley v. Jervis*, 22 B. 1; *Eyre v. McDowell*, 9 H. L. Cas. 619, 642; *Scott v. Hastings*, 4 Kay & J. 63; *Brearchliffe v. Dorrington*, 4 De G. & Sm. 122.

(f) *Arlen v. A.*, 29 C. D. 703.

(g) *Pickering v. The Hfracombe R. Co.*, L. 113 C. P. 235; *Robinson v. Nesbitt*, *Ibid.*, 264; overruling *Watts v. Porter*, 3 El. & Bl. 743; R. S. C., O. 45, r. 1, Annual Practice, Part II.

(h) *Norrish v. Marshall*, 3 Madd. 475; *Stocks v. Dobson*, 4 De G. M. & G. 11; *Cothay v. Sydenham*, 2 Bro. Ch. 391; *Leslie v. Baker*, 2 Y. & C. C. 91.

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Priority, when gained by a subsequent purchaser or incumbrancer giving notice.—If the assignee of a chose in action, or a trust estate of personalty, does not perfect his title by giving notice of the assignment to the debtor or trustees, a subsequent purchaser or incumbrancer without notice of the former assignment (a) giving notice of his assignment will thereby acquire priority; and it is of no importance, in the question of priority, whether the interest of the assignor be vested or contingent, present or reversionary. The leading case upon this subject is *Dearle v. Hall* (b), in which case Brown, being entitled for life to the yearly sum of 93*l.*, being the dividend arising from the moiety of a sum of money invested in the names of the executors of his father's will, by an indenture, dated the 19th of December, 1808, assigned it to Dearle, to secure an annuity granted in consideration of 204*l.*; and by another indenture, dated the 26th of September, 1809, he assigned the same yearly sum to Sherring, to secure an annuity granted in consideration of 150*l.* No notice of the assignments was given by either Dearle or Sherring to the executors. By an indenture, dated the 20th of March, 1812, Brown, in consideration of 711*l.* 3*s.* 6*d.*, assigned the same annual sum absolutely to Hall, who, previous to making the purchase, called for every information respecting the fund and the title from the acting executor, and on the 25th of April, 1812, served the executors *with a written notice* to pay him, as assignee of Brown, a moiety of the dividends of the fund during Brown's life, and they accordingly paid him a sum of money on account thereof. On the 17th of October following, the executors, for the first time, received notice of the assignments to Dearle and Sherring, and refused to make any more payments until the rights of the different parties should be ascertained. *Plumer*, M.R., after an elaborate consideration of the authorities, dismissed the bills filed by Dearle and Sherring, holding, that Hall had a better equity to the fund, and that the assignment to him, though posterior in date, was entitled in priority, in consequence of his having given, and of Dearle and Sherring having neglected to give, notice to the trustees. "The question," said his Honor, "here is, not which assignment is first in date, but whether there is not, on the part of Hall, *a better title to call for the legal estate* than Dearle or Sherring can set up; *or rather the question is, shall these plaintiffs now have equitable relief, to the injury of Hall?* What title have they shown to call on a Court of

(a) *Spencer v. Clarke*, 9 C. D. 137; 786.

Warburton v. Hill, Kay, 470; *Newman v. N.*, 8 C. D. 674; *Re Hamilton*, &c., 12 C. D. 711; *Re Holmes*, 29 C. D.

(b) (1823) 3 Russ. 1. See an excellent article on this case in *Law Quarterly Review*, Oct., 1895.

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justice to interpose on their behalf, in order to obviate the consequences of their own misconduct? All that has happened is owing to their negligence, a negligence not accounted for, in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is a plaintiff to be heard in a Court of equity, who asks its interposition in his behoof, to indemnify him against the effects of his own negligence, at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him? The question here is, not as in *Evans v. Bicknell* (a), whether a Court of equity is to deprive the plaintiffs of any right,—whether it is to take from them, for instance, a legal estate, or to impose any charge upon them: it is simply, whether they are entitled to relief against their own negligence. They did not perfect their securities: a third party has innocently advanced his money, and has perfected his security, as far as the nature of the subject permitted him. Is this Court to interfere to postpone him to them? They say, that they were not bound to give notice to the trustees, for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract, he with whom you are dealing is personally bound. But if you mean to go further, and to *make your right attach upon the thing* which is the subject of the contract, it is necessary to give notice; and, unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession; and it is *possession* which determines the apparent ownership. If, therefore, an individual, who, in the way of purchase or mortgage, contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in *Ryall v. Rowles* . . . If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties, on the hypothesis of his being the owner of that which in fact belongs to you. The principle has been long recognised

(a) 6 V. 174: 5 R. R. 245.

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even in Courts of law. In *Tryne's Case* (a), one of the badges of fraud was, that the possession had remained in the vendor. Possession must follow right: and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences. . . . It is true that a chose in action does not admit of tangible actual possession, and that neither Brown nor any person claiming under him were entitled to possess themselves of the fund which yielded the 93*l.* a-year. But, in *Ryall v. Rowles*, the Judges held, that, in the case of a chose in action, *you must do everything towards having possession which the subject admits*; you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect (b), as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person.

"Is there the least doubt, that, if Brown had been a trader, all that was done by Dearle and Sherring would not have been in the least effectual against his assignees; but that, according to the doctrine of *Ryall v. Rowles*, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case, it was the opinion of all the Judges, that he who contracts for a chose in action, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title,—to give a complete right *in rem* (c), and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you will allow him to remain, notice is not necessary; for, against him, the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated; you had priority, but that priority

(a) 3 Rep. 80.

(b) Cf. *English, &c. Trust v. Brunton*, (1892) 2 Q. B. p. 8.(c) But see as to this judgment of Lord Macnaghten, *Ward v. Duncombe*, *infra*.

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has not been followed up; and you have permitted another to acquire a better title to the legal possession. What was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the civil law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he who does not obtain such possession, must take his chance (a).” The cases of *Dearle v. Hall*, and *Loveridge v. Cooper*, were afterwards affirmed by *Lynghurst, C.* upon appeal, who observed (b) that where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and vendee but as to third persons in order that they may not be deceived by apparent possession. * * * That in cases like the present, the act of giving the trustee notice was, in a certain degree, taking possession of the fund; that it was going as far towards equitable possession as it was possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice.

In *Foster v. Cockerell* (c), M. conveyed estates to trustees, on trust to sell and pay creditors of B., and subject thereto on trust for M. for life, remainder to B. in fee. M. died and B. granted annuities charged on the estate, and then mortgaged the estate without notice of them. The trustees sold the estate, and the mortgagees, who had not made any inquiries of the trustees, gave notice to them of the mortgage five years after it was created, and it was held that they had priority over the annuitants by reason of such notice. “This case unquestionably lays down that the rule in *Dearle v. Hall* is independent of any consideration of the conduct of the competing assignees, where the assignee second in date, has no notice of the earlier assignment. Priority in such cases depends simply and solely on priority of notice (d).” And a second assignee giving first notice of his assignment will be equally entitled to priority when he has taken such assignment from the legal personal representative of the *cestui que trust* who made the assignment to a first assignee (e).

(a) See also *Loveridge v. Cooper*, 3 Russ. 1; *Re Richards*, 45 C. D. p. 595.

(b) 3 Russ. 48.

(c) 3 Cl. & Fin. 456.

(d) Per Lord *Macnaghten*, *Ward v. Duncombe*, (1893) A. C. p. 390; and see *Smith v. S.*, 2 Cr. & M. 231; *Timson v. Ramsbottom*, 2 Keen, 49; *Meux v. Bell*, 1 Ha. 73; *Etty v.*

Bridges, 2 Y. & C. C. C. 494; *Warburton v. Hill*, 1 Kay, 470; *Stocks v. Dobson*, 5 De G. & Sm. 760; *Lloyd v. Banks*, 3 Ch. 488; *Dunster v. Glengall*, 3 Ir. Ch. Rep. 47. See also *Re Richards*, supra; *English, &c. Trust v. Brunton*, (1892) 2 Q. B., p. 8.

(e) *Re Freshfield's T.*, 11 C. D. 198.

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In *Ward v. Duncombe* (a), M. W. was entitled in remainder under a will to a share of a fund in the hands of S. and E. as trustees thereof. M. W. married H. D. and settled her share, reserving a life interest. S. had notice of this settlement, E., the other trustee, had not. M. D. and her husband proposed to mortgage her share as unencumbered. The intending mortgagees applied for information to the trustees S. and E. S. gave an evasive answer, but was not pressed further; E. stated, with truth, that he had not received notice of any incumbrance. The mortgage being completed, formal notice was sent to both trustees. E. acknowledged the notice, S. did not. Then S. died, without having informed E. of the settlement. E. therefore, the sole trustee of the will, had notice of the mortgage, but not of the settlement. Then one Evitt was appointed trustee of the will in place of S. deceased, and together with E. Held, affirming *Stirling, J.* and the C. A. (b), that the trustees of the settlement were entitled in priority to the mortgagees, for the death of S. could not deprive the trustees of the settlement of the priority which they had already acquired during his life. In *Ward v. Duncombe* all the principal cases relating to the effect of notice on the equitable assignment of a chose in action were thoroughly examined, and the foundation and scope of the doctrine laid down in *Deacle v. Hall* considered. The result seems to be that if one of the trustees of a fund has knowledge of an incumbrance affecting it, such knowledge amounts to express notice, and will enure for the benefit of such incumbrancer, and a subsequent incumbrance made whilst one of the trustees has such knowledge, cannot gain priority over it by the fact that the subsequent incumbrancer has given notice to any or all of the trustees. But if such trustee died or resigned, and then a further incumbrance was made and notice given to the existing trustees, none of whom had knowledge of any prior incumbrance, then, *quære*, and see judgment of Lord *Macnaghten*, (1893) A. C. pp. 394, 395.

The rule in *Deacle v. Hall* is not confined to chattels in possession, it applies to bonds, simple contract debts, and other choses in action (c), but it has nothing to do with the assignment of equitable interests in real estate (d), and the principle of it is not to be extended, *Ward v. Duncombe*, *supra*.

Trustees of a fund are not under any legal obligation to answer inquiries put to them as to existing incumbrances (e), and if they

(a) (1893) A. C. 369.

(d) See (n.) "Interests in land," p.

(b) See *Re Wyatt*, (1892) 1 Ch. 188. 129.

(c) See *Re Richards*, 45 C. D. p. 393,
as to mortgage debts.

(e) *Low v. Bouverie*, (1891) 3 Ch.
82. See *Re Tillott*, (1892) 1 Ch. p. 88.

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decline to do so the intending incumbrancer proceeds at his own risk (a). As to the importance of giving express notice, see the observations of Cairns, L. J. in *Lloyd v. Banks* (b).

How and to whom Notice should be given.—It is not necessary that a notice to a trustee should be a notice formally given in writing: a verbal informal notice is sufficient, provided the fact of the assignment is distinctly and clearly brought to the mind and attention of the trustee (c). But a statement made in a mere casual conversation is not sufficient (d).

Although notices should be given either by the assignee himself, or some agent for him, it is sufficient if the trustee has received *abundantly* such notice as a reasonable man in the ordinary course of business would act upon (e). Notice of an assignment of personalty vested in trustees, or of debts, should as a general rule, be given to *all* the trustees or debtors in writing (f). Where funds assigned are affected by successive trusts, notice of an assignment, in order to be effectual, should be given to the trustees *for the assignor*, not to the trustees of the original settlement, although the latter may have the actual control of the funds. In *Stephens v. Green* (g), a fund was in Court representing certain legacies bequeathed by testator A., whose estate was being administered in an action *S. v. G.* A's son was entitled to a reversionary interest in this fund, and his estate was also being administered in a second action, *G. v. R.* The daughter of A's son was entitled to a share in the fund under her father's will, and by post-nuptial settlement had agreed to assign her share to the trustees of the settlement. She then mortgaged her share to a company without notice of the settlement. In October, 1883, the company obtained a stop order in the first action. In December, 1883, the trustees obtained a like order in the same action. In January, 1884, the trustees gave notice of the settlement to the legal personal representatives of the son. The trustees were held entitled to priority.

Notice to one of several co-trustees or obligors is, it seems,

(a) *Per Herschell, C., Ward v. B. B. So. v. Rayner*, 14 C. D. 406, 410. Duncombe, (1893) A. C. p. 383.

(b) 3 Ch. 488.

(c) *Browne v. Savage*, 4 Dr. 640; *North British L. Co. v. Hallett*, 7 Jur. (N. S.) 1263; *Lloyd v. Banks*, 3 Ch. 488; *Smith v. S.*, 3 Russ. 1.

(d) *Re Tichener*, 35 B. 317; *Re Brown's T.*, 5 Eq. 88; *Saffron Walden*

(e) *Lloyd v. Banks*, 3 Ch. 488.

(f) *Re Hall, Nolan v. O'Brien*, 7

L. R. Ir. 180.

(g) (1895) 2 Ch. 118; *Holt v. Dewell*, 4 Ha. 446; *Bridge v. Beadon*, 5 Eq. 664, observed upon; *Re Booth's Sett. T.*, 1 W. R. 444, overruled.

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sufficient notice as long as circumstances remain unaltered, because a subsequent incumbrancer ought to make enquiries from *all* the trustees; but it might not be sufficient on the death of that trustee or obligor, or upon his otherwise ceasing to continue a trustee (*a*). And it is immaterial whether the notice be given to an acting or a non-acting trustee (*b*).

New trustees of a settlement are not affected with notice of an assignment of the funds comprised in the settlement given to their predecessors, nor are they bound to inquire from them whether they have received notice of any incumbrance, and it has never been the practice of the Court of Chancery on appointing new trustees of funds to make such an inquiry (*c*). Hence if notice be given to all the trustees who afterwards die or retire, and new trustees are appointed, such trustees will not incur any liability if they distribute the trust funds before receiving any notice, and a subsequent incumbrancer who gives notice to them will gain priority over a former incumbrancer who merely gave notice to their predecessors (*d*).

It follows, therefore, that assignees are not perfectly secure even when they give notice to all the trustees; but if they wish to be so they should repeat their notice when new trustees are appointed, or have their deed endorsed on the original deed, or obtain a transfer of the funds into Court, or take proceedings under the Rules of Court hereinafter referred to (*e*).

Although as a general rule notice to one of several trustees is with the limitations before mentioned, sufficient, yet where such one of the trustees is also a beneficiary, and assigns his beneficial interest in the trust fund to a stranger, the notice acquired by such trustee as assignor will not constitute notice to the trustees so as to prevail over subsequent incumbrances, it being the interest of such trustee as assignor to conceal the assignment (*f*); but where such trustee

(*a*) See *Ward v. Duncombe*, (1893) A. C. pp. 394, 395; *Smith v. S.*, *Meux v. Bell*, *Timson v. Ramsbottom*, *Willes v. Greenhills*, there cited; also *Ex p. Hennessey*, 1 Con. & Law. 562; *Ex p. Rogers*, 8 De G. M. & G. 271; *Re Hall*, 7 L. R. Ir. 180.

(*b*) *Smith v. S.*, 2 C. & M. 233.

(*c*) *Phipps v. Lovegrove*, 16 Eq. 80.

(*d*) *Phipps v. Lovegrove*, *supra*; cf. *Newman v. N.*, 28 C. D. p. 678; *Hallows v. Lloyd*, 39 C. D. p. 692; *Meux v. Bell*, 1 Ha. 97; *Re Durand's T.*, 8

W. R. 33; *Etty v. Bridges*, 2 Y. & C. C. C. 492; *Brown v. Savage*, 4 Dr. 635; but see *Lord Macnaghten's* judgment in *Ward v. Duncombe*, (1893) A. C. pp. 394, 395.

(*e*) p. 126; *Phipps v. Lovegrove*, *supra*; *London Chartered Bank, &c. v. Lomprière*, 4 P. C. C. 572.

(*f*) *Ex p. Hennessey*, 1 Con. & Law. 559; *Thompson v. Spiers*, 13 Si. 469; *Martin v. Selgwick*, 9 B. 333; *Powles v. Page*, 3 C. B. 16; *Ex p. Boulton*, 1 De G. & J. 175.

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assigns his beneficial interest to one of his co-trustees, the notice which that co-trustee acquires as assignee constitutes during his life notice to the trustees, it not being his interest as assignee to conceal the assignment, and therefore it will prevail over subsequent incumbrancers with notice (a).

If the trustee is himself a person who has advanced money to a beneficiary, and has taken an equitable assignment inasmuch as he could not give notice to himself, he will be entitled to priority over any person taking a subsequent assignment (b).

A trustee who receives notice of an assignment of the trust fund made by the *cui que trust*, is not, in the absence of inquiry, bound to inform the person giving him the notice, that he himself has a prior assignment, and by omitting to give that information the trustee will not lose his priority (c). *Secus*, if he had held out any inducement to such person to advance his money (d).

Although notice should be given as early as possible, it is sufficient if it be given before another notice (e). A purchaser, moreover, from an assignee who has given no notice cannot object to the title, unless he can show some intermediate incumbrance, but the vendor ought to point out to him who have been the trustees from time to time, in order to enable the purchaser to ascertain whether there have or have not been any intermediate incumbrances (f). If, however, evidence as to the persons who have been trustees is not produced, the title will be bad (g); but time may be given to produce sufficient evidence, if the vendor thinks he can procure it (h).

A general notice of a charge without specifying the amount will be sufficient (i), and a mere mistake in the description of the fund, if there is no doubt as to its being intended, will not render the notice void as against a subsequent purchaser. But the Court will not allow the former assignment to stand as a security against him

(a) *Browne v. Savage*, 4 Dr. 635; *Willes v. Greenhill*, 29 B. 376, 391; *Commissioners, &c. v. Harby*, 23 B. 508; *Re Selby*, 8 De G. M. & G. 271; *Newman v. N.*, *supra*. But see *Ex p. Stewart*, 34 L. J. (Bk.) N. S. 6; *Ex p. Smyth*, 3 Mont. D. & De G. 687; *Ex p. Boulton*, 1 De G. & J. 163.

(b) *Elder v. Maclean*, 5 W. R. 447; *Thompson v. Tomkins*, 2 Dr. & Sm. 8; *Assignees of Dunno v. Hibernian, &c., Co.*, 2 Ir. R. Eq. 82; *Phipps v.*

Lovegrove; *Newman v. N.*, *supra*, but see *The Commissioners, &c. v. Harby*, 23 B. 508.

(c) *Re Lewer*, 5 C. D. 61.

(d) *Ib.*

(e) *Meux v. Bell*, 1 Ha. 86; *Stocks v. Dobson*, 4 De G. M. & G. 17; *Browne v. Savage*, *supra*.

(f) *Hobson v. Bell*, 2 B. 17.

(g) *Ib.* p. 24.

(h) *Ib.* p. 25.

(i) 21 B. 424.

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beyond the sum mentioned in the notice (a), in which case it was held that where two charges on a chose in action were contained in one deed, and a notice was given to the trustees which specified one only; the trustees had not constructive notice of the contents of the deed, so that notice of both the charges was to be imputed to them.

Where stock standing in the names of trustees has been given as a specific legacy, and no assent has been given to it by the executor, notice to one of the trustees, not being an executor, is not sufficient to vest in the parties claiming by assignment from the legatee, that equitable possession of the fund which is required in order to postpone a subsequent incumbrancer, who has taken the precaution of giving such notice to the executor (b). A subsequent assignee giving notice of the assignment, will not gain priority over a prior assignee who has not given notice, if, at the time of giving such notice, he has express or implied notice of former assignment (c).

Where notices of assignments are simultaneous, the assignments will take priority according to their dates (d).

Notice by a subsequent incumbrancer to a person who may possibly become a trustee, before he was actually one, will be ineffectual to displace the priority of a former incumbrancer. Thus, in *Buller v. Plunkett* (e), an officer in the army covenanted to assign to the trustees of a settlement any moneys which he might receive from the sale of his commission, and subsequently executed a second covenant to assign the same proceeds to another person who had no notice of the settlement. The second assignee gave the first notice to the army agent of the regiment, but the trustees also gave notice, both notices being given before the fund reached the army agent's hands. It was held by *Page Wood*, V.-C., that the trustees of the settlement had priority (f). And where an equitable assignee gives notice before the fund comes into possession of a trustee, as, for instance, an army agent, he will be postponed to a subsequent assignee, who has given notice after the fund has come into possession (g). Where, moreover, an officer retired from Her Majesty's service, the amount in respect of his commission to which he was entitled under 34 & 35 Vict. c. 86, s. 3, "upon his retirement," though it had been previously lodged by the Commissioners with the army agents, and by them

(a) *Woodburn v. Grant*, 22 B. 483; and see *Re Bright's T.*, 21 B. 430.

(b) *Holt v. Dewell*, 4 Ha. 447, followed in *Stephens v. Green*, *supra*, p. 121.

(c) *Spencer v. Clarke*, 9 C. D. 137.

(d) *Calisher v. Forbes*, 7 Ch. 109; *Johnstone v. Cox*, 16 C. D. 517.

(e) 1 John. & H. 441.

(f) See also *Webster v. W.*, 31 B. 393; *Yates v. Cox*, 17 W. R. 20.

(g) *Somerset v. Cox*, 33 B. 634.

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entered in their books under the officer's name was not money of the officer so as to be capable of being affected by notice from an incumbrancer to the army agents until the retirement was gazetted (*a*). These cases arising out of sales of commissions, when they come to be examined, turn upon the fact that the notice was given to a mere possible agent before he was an actual agent—before the time at which he was in any sense liable to make payment, neither being himself a debtor, nor at that time charged with the duty of paying the money in question (*b*); in which case, however, it was held that when the second notice was given by the first assignee, the army agents had become the stakeholders of the agreed and appropriated fund for the assignor's payment.

Notice to Solicitors.—Notice of an assignment to the solicitors of trustees (*c*) will be sufficient only if they are actually, either expressly or impliedly, authorised as agents to receive such notices (*d*). In *English, &c., Investment Co. v. Brenton* (*e*), a company which had power to issue debentures issued some with a clause restricting the company's power of mortgaging. The company were entitled to a debt which they wished to mortgage. The solicitor who was negotiating the loan, asked the managing director of the company whether there was anything in the debentures which would interfere with the validity of the mortgage of the debt, which he proposed to take from the company, and he was told there was not. Held, that the mortgagees of the debt took in priority to the debenture-holders.

There are cases in bankruptcy in which it was held that notice to a person acting as solicitor was sufficient to take a chose in action out of the order and disposition of the assignor, but the Courts have always shown a great inclination to prevent a man losing his property through the fiction that somebody else has been giving credit to the bankrupt on the supposition that it was his, which is not the fact in one case out of a hundred (*f*).

Notice to Companies, &c.—The principle of *Dearle v. Hall* (*supra*, p. 116), does not apply to joint stock companies under the Act of

(*a*) *Johnstone v. Cox*, 19 C. D. 17, 26; *Arden v. A.*, 29 C. D. 702; *Re Cousin's T.*, 31 C. D. 671; *Hester v.*

(*b*) See *Addison v. Cox*, 8 Ch. 79.

(*c*) *Rickards v. Gledstones*, 3 Gif. 298; *Willes v. Greenhill*, 29 B. 392.

(*d*) *Saffron Walden, &c., Building Society v. Rayner*, 14 C. D. 406, 410; and see *Re Russell's Policy T.*, 15 Eq.

H., 34 C. D. 616; *Re Hall & Co.*, 37 C. D. 712; *Tato v. Hyslop*, 15 Q. B. D. 368; *Re Frewen*, 60 L. T. 953.

(*e*) (1892) 2 Q. B. 706.

(*f*) Per *James, L. J.* in *Saffron Walden, &c., B. S. v. Rayner*, *supra*.

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1862 (a). But it does not follow that the directors and secretary of the company might not be personally liable for disregarding a notice of a trust as to shares, and for allowing them to be transferred in contravention thereof (b).

Notice when given to the proper officers of the company or corporation, as the secretary (c), a director and actuary (d), a director and auditor (e), has been held good. But a mere casual mention thereof to a clerk in the office of the company has been held not to be constructive notice to the company in whose employ he is (f), but verbal notice to a board of directors in the way of business has been held good (g).

Distringas.—Where, by reason of the death of the person in whose name stock was standing, without legal representatives, there was no trustee to whom notice could be given, it was held, by *Knight-Bruce*, V.-C., that a second incumbrancer, without notice of the first, by serving a notice of *distringas* on the Bank of England, thereby obtained priority (h).

Under the Rules of the Supreme Court, 1883, Order XLVI., rule 2, "No writ of *distringas* shall be hereafter issued under the Act," 5 Vict. c. 5, s. 5.

And service of an affidavit and of the duplicate of the filed notice, as required by the rules of 1883, upon the Bank of England or any public company, whether incorporated or not, is to have the same effect as a writ of *distringas* formerly had (i).

Stop Orders.—Where a fund is not in the hands of trustees but in Court, then a person taking an assignment of it should obtain a *stop order*, otherwise a subsequent assignee who, at the time of his advance, had no notice of a first incumbrance (k), will gain priority by

(a) See (n.) "Companies Act, 1862," p. 127, *infra*.

(b) *Chadwyck Hoaly on Companies* (1894), p. 83.

(c) *Ex p. Stright*, 1 Mont. 502; *Gale v. Lewis*, 9 Q. B. 730; *Société Générale de Paris v. Tramways, &c.*, 14 Q. B. D. 424.

(d) *Ex p. Watkins*, 4 Deac. & Ch. 87; but see *Ex p. Hennessy*, 1 Con. & Law. 599.

(e) *Ex p. Wraithman*, 4 Deac. & Ch. 412; but see *Ex p. Hennessy*, 1 Con. & Law. 559.

(f) *Ex p. Carbis*, 4 Deac. & Ch.

354; 1 Mont. & Ayr. 693, n. See also *Société Générale de Paris v. Tramways Union Co.*, *supra*.

(g) *Re Agra Bank*, 3 Ch. 555; *Alletson v. Chichester*, 10 C. P. 319; *Ex p. Richardson*, Mont. & Chit. 43.

(h) *Etty v. Bridges*, 2 Y. & C. O. C. 486.

(i) See the Annual Practice, 1896, O. 46, rr. 2—11.

(k) *Mutual L. A. S. v. Langley*, 32 C. D. 460; cf. *Warburton v. Hill*, Kay, 470; *Haly v. Barry*, 3 Ch. 456; *Re Holmes*, 29 C. D. 786; *Stephens v. Green*, p. 121, *supra*.

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obtaining the first stop order, although the person taking the first assignment be a trustee of the fund (a); or, although another assignee, after payment of the fund into Court, has given notice to the trustees prior, in point of date, to the stop order (b).

When an assignment is made of an interest in a trust fund, part of which is in Court and part in the hands of the trustees, the assignee, in order to complete his title, must, as regards the fund in Court, obtain a stop order, and as regards the fund in the hands of the trustees, give notice to the trustees. Notice to the trustees will be ineffectual as regards the fund in Court, and as to that fund the priorities of different assignees will be determined by the dates at which they have obtained stop orders. An assignee who has obtained a stop order is entitled (as regards the fund in Court), to priority over a prior assignee (of whose assignment he had no notice), who had given notice to the trustees before the date of the stop order, but who had not himself obtained any stop order (c).

And it has been held that a subsequent incumbrancer of a fund, when he has notice of a former incumbrance, cannot obtain priority by obtaining a stop order (d). The order should be left at the Paymaster-General's office (e).

Companies Act, 1862.—The principle established in *Dearle v. Hall* (supra, p. 116), as to the effect of notice in determining the priority of equitable rights, does not extend to the shares of companies registered under the Companies Act, 1862, or to companies governed by regulations having a provision similar to sect. 30 of that Act. The Companies Act, 1862, s. 30, forbids the entry of any trust on the register of companies, and where the shares of a company either registered under that statute, or containing a regulation to the like effect with that section are equitably assigned or mortgaged more than once, the priority of the assignees or mortgagees will be determined by the priority of the assignments or mortgages, and not by the priority of the notices thereof given to the company (f).

(a) *Elder v. Maclean*, 5 W. R. 447, observed upon in *Mutual L. A. S. v. Langley*, supra; *Thompson v. Tomkins*, 2 Dr. & Sm. 8.

(b) *Pinnock v. Bailey*, 23 C. D. 497, 498.

(c) *Mutual L. A. S. v. Langley*, 26 C. D. 686; 32 C. D. 460; cf. *Lister v. Tidd*, 4 Eq. 462; *Livesey v. Harding*, 23 B. 141.

(d) *Re A. D. Holmes*, 29 C. D. 786;

see 32 C. D. p. 472.

(e) *Waller v. Wildridge*, 3 Ir. Ch. Rep. 155; and see the cases cited, O. 46, 17, 12, 13, Annual Practice, 1896.

(f) *Société Générale, &c. v. Walker &c.*, 11 App. Cas. 20; *Powell v. London, &c. Bank*, (1893) 1 Ch. p. 617; *Colonial Bank v. Whinney*, 11 App. Cas. 426; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29; *Simpson v. Molson's Bank*, (1895) A. C. 270.

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Bankruptcy.—When *Dearle v. Hall* (supra, p. 116), was decided, the law relating to reputed ownership in bankruptcy extended to all choses in action. It does not now apply to any choses in action, except “to debts due or growing due to the bankrupt in the course of his trade or business (a). In order, therefore, to divest the bankrupt of his reputed ownership of debts due to him, the person to whom he has assigned them, must have done everything that is equivalent to a delivery of chattels personal—that is, he must obtain an assignment and delivery of the security, if any, and give notice to the debtor of the assignment (b). The only person to whom notice of the assignment need be given is the party from whom the assignor is to receive the payment of his money, and not the original debtor (c).

And notice to the debtors is equally necessary, where debts are assigned by a retiring partner to a partner continuing in the trade (d). A mere notice, however, to pay debts to one of the partners will not take the debts out of the order and disposition of the firm of which he was a member (e).

And now under the section 50 (5) of the Bankruptcy Act, 1883, “where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustees” (f). But to insure priority he must give notice (g).

Shares in a railway company transferable only by deed (h), debentures of a joint stock company (i), and policies of life assurance (k), are all “things in action” within s. 44 of the Act, and are exempt from the doctrine of reputed ownership.

Assignments of debts are not governed by the same rules as bills of exchange and promissory notes, so as to make it obligatory upon the assignee of a debt to give notice to the assignor of non-payment

(a) Bankruptcy A. 1883, s. 44, s. 5. iii. *Ward v. Duncombe*, (1893) A. C. p. 393; *Re Jenkinson*, 15 Q. B. D. 441.

(b) *Jones v. Gibbons*, 9 V. 409; *Re Richards*, 45 C. D. p. 596; 7 B. R. p. 409; and see *Ex p. Rawlings*, 60 L. T. 156; *Re Tillett*, 60 L. T. 575; *Rutter v. Everett*, 13 R. Oct. 121.

(c) *Gardner v. Lachlan*, 4 My. & C. 129; *Buck v. Lee*, 3 Nev. & Man. 380; *Ex p. M'Turk*, 2 Deac. 58.

(d) See *Ex p. Burton*, 1 G. & J. 207; *Ex p. Usborne*, 1 G. & J. 358; *Ex p. Colvill*, Mont. 110; *Ex p. Tennyson*, 1 Mont. & B. 67.

(e) *Ex p. Sprague*, 4 De G. M. & G. 866; cf. *Ex p. Woodgate*, 2 Mont. D. & De G. 394.

(f) See as to the corresponding clause under B. A. 1849, s. 141, *Re Coombe's T.*, 1 Gif. 91; under the B. A. 1869, s. 22, *Palmer v. Locke*, 18 C. D. 384; *Re Jakeman's T.*, 23 C. D., p. 372; *Yate-Lee, Bankruptcy*, (1891) pp. 408, 449.

(g) *Re Stone's Will*, W. N. (93) 50.

(h) *Colonial Bank v. Whinney*, 11 App. Cas. 426.

(i) *Re Pryce*, 4 C. D. 685.

(k) *Ex p. Ibbetson*, 8 C. D. 519.

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by the debtor (*a*). But the assignee of a debt in such a case is chargeable for wilful default, as every mortgagee must be (*b*)

Freight.—A mortgagee of a ship, being under the mortgage entitled to the freight as a chose in action (*c*), is, by taking possession, or doing an act equivalent to taking possession, before the freight becomes payable, entitled to receive it as against the mortgagor or his assignees in bankruptcy (*d*), a judgment creditor (*e*), or assignees for value. In the case of *Liverpool Marine, &c., Co. v. Wilson* (*f*), it was held that the first registered mortgagee of a ship, by taking possession of her before the freight was completely earned, obtained a legal right to receive the freight, and to retain thereout not only what was due on his first mortgage, but also the amount of any subsequent charge which he might have acquired on the freight, in priority of every equitable charge of which he had no notice; and that it was immaterial that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. So a mortgagee of ship and general freight taking possession of the ship before any freight has become payable from the charterers to the owners, has been held to be entitled to freight in priority of a subsequent particular assignee of freight, although he may have given notice of his assignment to the charterers before the mortgagee took possession of the ship (*g*)

Where an assignee of a ship and cargo has done all in his power towards taking possession, he will not lose his priority (*h*).

Interests in Land.—The doctrine of notice applicable in determining the priority of purchasers, or incumbrancers of choses in action, does not prevail as to equitable estates or interests in land, whether freehold or leasehold (*i*). In *Willshere v. Robbins* (*k*) a testator bequeathed a leasehold estate to trustees, upon trust, as therein mentioned, and first, he charged the estate with the payment of an annuity to his daughter during all his interest in the estate. The daughter afterwards mortgaged her annuity, first to A, and afterwards to B, but B.

(*a*) See *Glyn v. Hood*, 1 De G. F. & J. 334.

(*b*) Per *Turner*, L.J., *Glyn v. Hood*, 1 De G. F. & J. 309.

(*c*) *Kerswill v. Bishop*, 2 C. & J. 529. See Merchant Shipping Act, 1894, s. 36.

(*d*) *Rusden v. Pope*, 3 L. R. Ex. 269; *Wilson v. W.*, 14 Eq. 32.

(*e*) *Langton v. Horton*, 1 Hare, 549.

(*f*) 7 Ch. 507.

(*g*) *Brown v. Tanner*, 3 Ch. 597; *W. & T.*—VOL. 1.

Cato v. Irving, 5 De G. & Sm. 210; *Wilson v. W.*, 14 L. R. Eq. 32; *Keith v. Burrows*, 1 C. P. D. 733; *Anderson v. Butler's, &c., Co.*, 48 L. J. Ch. 828.

(*h*) *Feltham v. Clark*, 1 De G. & Sm. 507; *Langton v. Horton*, 1 Ha. 549.

(*i*) See *Jones v. J.*, 8 Si. 633; *Wilnot v. Pike*, 5 Ha. 14; *Lee v. Howlett*, 2 Kay & J. 531; *Phipps v. Lovegrove*, 16 Eq. 80; *Ex p. Rabbidge*, 8 C. D. 370.

(*k*) 14 Si. 76.

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gave the trustees notice of his mortgage before A did. It was held, by *Shadwell, V.-C.*, that the annuity was not a chose in action, but a chattel interest, and that B. had not gained any priority over A. The rule in *Darke v. Hall* (supra, p. 116) has nothing to do with the assignment of equitable interests in real estate (a).

Where, however, a person is equitably entitled to moneys secured on (b), or to arise from the sale of (c), real estate, or to a portion to be raised by trustees out of real estate by sale, mortgage, or otherwise (d), such person is not considered to have an interest in land, and the assignees of such moneys, in order to retain priority over subsequent assignees for value, must give notice to the trustees, and previous to the Bankruptcy Act, 1869, they were also required to give such notice to prevent the application of the doctrine of reputed ownership. The registration of an assignment of a legacy charged upon land in a register county is unnecessary, and will not postpone a prior unregistered assignment of the same legacy (e).

5. Rights and Remedies of Assignee under an Equitable Assignment.

Where the assignment is of a *chose in action in equity* the assignee could sue for it in his own name in the Court of Chancery and could compel the trustee to vest the legal estate in him (f).

Where the assignment was of a *legal chose in action*, the Courts of Law for a long time allowed the assignee to sue in the name of the assignor (g). But if the assignment of a personal contract is defective in form and the person liable upon it promise to pay the demand or satisfy the claim in consideration of time being given him, that will be a new contract, upon which the assignee may sue in his own name (h). If the debtor assented to the transfer of a debt, an action might be brought at law against him by the assignee, on the implied promise to pay (i) but if he did not, it could only be brought in the name of the assignor.

(a) See *Ward v. Duncombe*, (1893) A. C. p. 390; and see as to mortgage debts, *Re Richards*, (1890) 45 C. D. pp. 595, 598; *Jones v. Gibbons*, 9 V. 467; 7 R. R. 247; *Arlen v. A.*, infra.

(b) *Daniel v. Freeman*, 11 Ir. R. Eq. 233.

(c) *Lee v. Howlett*, 2 Kay & J. 531; *Foster v. Cockerell*, 3 Cl. & Fin. 456; *The Consolidated &c., Co. v. Riley*, 1 Gif. 371.

(d) *Re Hughes' Trust*, 2 Hem. & M.

89.

(e) *Malcolm v. Charlesworth*, 1 Keen, 63; *Arlen v. A.*, 29 C. D. 702.

(f) *Goodson v. Ellison*, 3 Russ. 583; *Jones v. Farrell*, 1 De G. & J. 208.

(g) *Winch v. Keeley*, 1 T. R. 619; *De Pothonier v. De Mattos*, El. B. & E. 467; *Master v. Buller*, 4 T. R. 340.

(h) Addison, *Contracts*, 1892, p. 208.

(i) *Israel v. Douglas*, 1 H. Black. 239; *Baron v. Husband*, 4 B. & Ad. 611.

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Equity, however, would interfere with its assistance if the assignor, being properly indemnified against all costs and charges, refused to allow the assignee to use his name or obstructed him when doing so (a).

By the Judicature Act, 1873, s. 24, s.s. 4, all the Courts are to recognise and take notice of all equitable estates, titles, and rights, and by s. 25, s.s. 11, if there is any conflict between the rules of equity and the rules of the common law, the rules of equity are to prevail, so that the assignee of an equitable chose in action can sue in all the Divisions of the High Court in his own name but if the subject-matter of the suit be a legal chose in action, then it seems that in order to entitle the assignee to sue in his own name, the provisions of s. 25 s.s. 6, of the Judicature Act, 1873 (see infra p. 140), must have been complied with.

When a debtor had received notice of an equitable assignment of the debt, he was bound to pay the debt to the assignee although the assignor might have commenced proceedings against him at law to recover it, and although the equitable assignee refused to indemnify him on receiving payment (b). And where a debtor makes an assignment of a debt due or to become due and notice thereof is given to the creditor, if the creditor afterwards voluntarily pays the debt to the assignor, he will be liable to repay it to the assignee (c). So where a trustee or executor has notice that a legacy is charged he must withhold all further payments to the legatee, unless by consent of the assignee (d). Where the assignment is of a debt to become due by instalments for work done, the assignee will be entitled to whatever has been earned up to the bankruptcy of the assignor (e); but where a trader assigns the future receipts of his business, even if for value, this as regards receipts accruing after the commencement of his subsequent bankruptcy, is inoperative as against the title of the trustee in bankruptcy (f), for from the commencement of the bankruptcy the profit has been earned by the trustee and not by the debtor (g).

See further, "Distringas" and "Stop Orders," p. 126.

(a) *Hammond v. Messenger*, 9 Si. 569.

327—332; and the judgment of *Eldon*, C. in *Wood v. Griffith*, 1 Swan. 56.

(b) *Jones v. Farrell*, 1 De G. & J. 208; *Hutchinson v. Heyworth*, 9 A. & E. 375.

(c) *Brice v. Bannister*, 3 Q. B. D.

(d) *Stephens v. Venables*, 30 B. 627.

(e) *Ex p. Moss*, 14 Q. B. D. 310.

(f) *Ex p. Nichols*, 22 C. D. 78.

(g) *Yate-Lee, Bankruptcy*, p. 262; see *Re Davis*, supra, p. 106, where *Re Nichols*, 20 C. D. 782, was distinguished.

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6. The Assignment of a Chose in Action is "subject to all Equities"

The assignee of a chose in action, as a general rule, whether it be a debt or an obligation, or a trust fund, although without notice, takes it subject to all the equities which subsist against it. Thus, in the case of *Turton v. Benson* (a), a son on his marriage was to have 3,000*l.* portion with his wife, and privately, without notice to his parents, who treated for the marriage, gave a bond to the wife's father to pay back 1,000*l.* of the portion seven years after, and the bond was afterwards assigned for the benefit of creditors, *Jegrell*, M.R., and on appeal Lord *Manchester*, held, that the bond, being void in equity, would not be made better by the assignment (b).

The assignee of a debt is bound by the state of the accounts between the assignor and the debtor at the date of the assignment. And if a creditor assigns over a debt which has been partially satisfied the assignee, although without notice, will take subject to the state of accounts at the date of the assignment (c), and if the assignee does not give notice of the assignment to the debtor, he will be obliged to allow the payments which the debtor subsequently makes to the creditor (d). So, unless the debentures of a company are so framed as to have the character of negotiable instruments, the assignee of such a debenture takes subject to all equities subsisting between the assignor and the company. In *Christie v. Tarrant* (e), T, who held shares and debentures in a company, deposited in March, 1890, debentures with the plaintiff bank to secure a debt. The debentures were not payable until 31st December, 1890, unless a winding-up took place. On 3rd November, 1890, a call was made, and became on that date a debt due from T. to the company. On 6th November, the plaintiff bank gave notice of the

(a) 1 P. W. 496.

(b) *Coles v. Jones*, 2 Vern. 692; *Davies v. Austen*, 1 V. jun. 247; *Hamil v. Stokes*, 4 Pr. 161; *Priddy v. Rose*, 3 Mer. 86; *Molloy v. French*, 13 Ir. Eq. R. 261; *Dibbs v. Goren*, 11 B. 183; *Houlditch v. Wallace*, 5 Cl. & Fin. 629; *Ward v. W.*, 4 Ir. Ch. R. 215, 220; *Cockell v. Taylor*, 15 B. 103; *Smith v. Parkes*, 16 B. 115; *Rolt v. White*, 31 B. 520; *Athenaeum L. A. Society v. Pooley*, 3 De G. & J. 294; *Graham v. Johnson*, 8 Eq. 36; see the remarks on this case in *Pollock, Con-*

tracts, 1894, p. 214; *Mangles v. Dixon*, 3 H. L. Cas. 702; *Phipps v. Lovegrove*, 16 Eq. 800; *Re Romford, &c., Co.*, 24 C. D. 85; and see *Pollock, Contracts*, 1894, p. 210; and as to legal choses in action, *Judicature Act*, 1873, s. 25, s.s. 6, *infra*, p. 140.

(c) *Ord v. White*, 3 B. 357; *Smith v. Parkes*, 16 B. 115; *Rolt v. White*, 31 B. 520.

(d) *Norrish v. Marshall*, 5 Madd. 475; *Stocks v. Dobson*, 4 De G. M. & G. 11.

(e) (1893) 2 Ch. 175.

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assignment to the company. On the 12th November this action was commenced. On the 19th the company went into liquidation and further calls were made on T. Held, that the company could set off in respect of the calls made before the winding up, but not in respect of those made after. After notice of an equitable assignment the debtor cannot set off as against the assignee, a debt which accrues due subsequently to the date of the notice, although that debt may arise out of a previous liability. But the debtor may set off as against the assignee, a debt which accrued due before notice of the assignment (*a*). An assignee of a chose in action takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action, the debtor cannot by payment, or otherwise, do anything to take away or diminish the rights of the assignee as they stood at the time of the notice (*b*). But where the creditors of a company proved their debts in the liquidation and assigned them to H. and H. assigned them to T. and the official liquidator subsequently recovered 2,000*l.* against H., T. was held entitled to the dividend on his debts, and a claim by the official liquidator to set off the 2,000*l.* against such dividend was dismissed (*c*) for the two demands were of a totally different origin, and equity will not allow, against the equitable chose in action, a set off of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed nor in any way referring to it (*d*).

An assignee of money to arise under a contract will only be entitled to it subject to the conditions of the contract (*e*).

Where by the articles of association of a company, it is provided

(*a*) *Watson v. Mid-Wales R. Co.*, L. R. 2 C. P. 593; *Wilson v. Gabriel*, 4 B. & S. 243.

(*b*) Per *James, L.J.*, *Roxburgh v. Cox*, 17 C. D. p. 526; and see the judgment in *Buck v. Robson*, 3 Q. B. D. p. 690.

(*c*) *Re Milan Tramways Co.*, 35 C. D. 586.

(*d*) *Watson v. Mid-Wales R. Co.*, L. R. 2 C. P. 593. And see further as to set-off, *Young v. Kitchin*, 3 Ex. D. 127; *Re China Steamship Co.*, 7 Eq. 210; *Re Natal Investment Co.* 3 Ch. 355; *Dickson v. Swansea, &c.*, R. C., 4 L. R. Q. B.

44; *Re Rumford Canal Co.*, 24 C. D. 85; *Newfoundland v. Newfoundland R. Co.*, 13 App. Cas. 199; R. S. C., O. 10, r. 3 (*n*), Annual Practice, 1896, and as to debentures, see *Chadwyck Healy Companies*, 1894, p. 176.

(*e*) *Tooth v. Hallett*, 4 Ch. 242. See *Myers v. United, &c., Assurance Co.*, 7 De M. & G. 112; *Bristow v. Whitmore*, 9 H. L. Cas. 391; *Yung Kwai chiu*, 3 Ex. D. 127, 150; *Barr Bannister*, 3 Q. B. D. 577; *Re p. Moss*, 14 Q. B. D. 310; *Drow v. Josolyne*, 18 Q. B. D. 590; *Webb v. Smith*, 30 C. D. 192.

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that the company should have a first and permanent lien and charge available at law and equity, on every share, for all debts due from the shareholders to the company, the rule in *Hopkinson v. Rolt* (a) applies, and the company cannot claim priority over subsequent incumbrances on the shares in respect of moneys which become due from the shareholder after the company has received notice thereof (b).

Though a bond be assigned *bonâ fide* and for valuable consideration to a third party, he will take it subject to all its defects in the title of the assignor. Thus, if a man assigns over a satisfied bond as a security for a just debt, the assignee cannot in equity set up the bond, which, being satisfied before, can receive no new force from the assignment (c), and see as to bonds being negotiable instruments (d). And before Indian bonds were rendered negotiable by 51 Geo. 3, c. 61, s. 1, a transferee who bought them in the market might obtain a better title to them than the person who transferred them to him had (e). It seems that as bonds are within the equity of the statute 5 & 6 Will. 4, c. 41, partially repealed by 37 & 38 Vict. c. 35, which makes securities valid in the hands of *bonâ fide* holders without notice of a gambling debt, the obligor will not be able to object to a bond assigned for valuable consideration without notice, that it was given to secure money lost by a wager on a horse race (f).

Assignees for value without notice of a residuary estate in Court in a suit in which it has been certified that all debts have been paid, will take subject to the claims of other creditors coming in and establishing their right to prove (g). So, if a trustee or executor assign a beneficial interest he may have taken under the will or trust, the assignee takes it subject to the equities which attached to the assignor; and therefore, if the latter, whether previously or subsequently to the assignment, commits a breach of trust whereby a debt becomes due to the estate, the assignee cannot claim the beneficial interest till he has satisfied the debt (h). The result is otherwise where the assignor became executor or trustee *after* the

(a) 9 Il. L. Cas. 114.

(b) *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

(c) *Turton v. Benson*, 1 P. W. 496; and see *Cavendish v. Greaves*, 24 B. p. 173; *Lewin, Trusts*, (1891) p. 784.

(d) *Graham v. Johnson*, 8 Eq. 36; *Crouch v. Crédit Foncier, &c.*, 8 L. R. Q. B. 374, cited *infra*, p. 136.

(e) See *Glyn v. Baker*, 13 East, 509; *Williamson v. Thomson*, 16 V. 443;

Croxon v. Moss, 2 Foss. & Fin. 539.

(f) *Hawker v. Hallowell*, 3 Sm. & G. 194.

(g) *Hooper v. Smart*, 1 C. D. 90.

(h) *Morris v. Livie*, 1 Y. & C. C. C. 380; *Clack v. Holland*, 19 B. 262; *Barrett v. Sheffield*, 1 De G. M. & G. 371; *Wilkins v. Sibley*, 4 Gif. 442; *Cole v. Muddle*, 10 Ha. 186; *Re Knapman*, *infra*.

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assignment took place, for in such case no equity arises in respect of a debt subsequently incurred (*a*), or where the doctrine relative to a purchaser for value without notice is applicable. Thus, where a person seised in trust for himself and another person as tenants in common in fee, retains the entire rents, the debt arising in favour of the co-tenant will not be charged on the trustee's beneficial interest as against a purchaser without notice from him (*b*).

Where a *cestui que trust* is indebted to the estate by reason of his having profited by a breach of trust an assignee for value of his beneficial interest will take it, subject to the equity of making good the breach of trust by which the assignor has profited (*c*), and as to setting off costs of a suit against the assignee of a legacy see *infra*, note (*d*).

But after an assignee has given notice of the assignment the trustee or obligor can, as against the assignee create no new charge or right of set-off (*e*). And neither at law nor in equity will there be allowed, against the assignee of an equitable chose in action, a set-off of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed nor in any way referring to it (*f*). And s. 25, sub-s. 6, of the Judicature Act, 1873 (*infra* p. 140), in making debts assignable at law, preserves all equities which would have been entitled to priority over the right of the assignee if that Act had not passed.

Exceptions to Rule.—Although the rule generally holds good, that whoever takes an assignment of a chose in action, takes it subject to all its equities, it has been held that the rule must yield where a contrary intention appears from the nature or in the terms of the contract (*g*). Moreover, any person may release those equities who is entitled to the benefit of them, and he may do so, either positively by words, in writing, or by the whole course of his conduct (*h*). And parties entitled to equities may lose their right to enforce them against the assignee, by

(*a*) *Irby v. I.*, 25 B. 632.

(*b*) See *British Mutual, &c., Co. v. Smart*, 10 Ch. 567.

(*c*) *Priddy v. Rose*, 3 Mer. 86; *Wilkes v. Greenhill* (No. 1), 29 B. 376; *Stephens v. Venables* (No. 1), 30 B. 625.

(*d*) *Re Knapman*, 18 C. D. 300.

(*e*) *Stephens v. Venables*, 30 B. 625, 627; *Wilkes v. Greenhill*, 29 B. 376; *Cavendish v. Greaves*, 24 B. 163, 173; *Moore v. Jervis*, 2 Coll. Ch. R. 60.

(*f*) *Watson v. Mid-Wales Railway Co.*, 2 L. R. C. P. 593; *Re Milan Tramways Co.*, 22 C. D. 122.

(*g*) *Re Agra, &c., Bank*, 2 Ch. 391; *Re Blakely Ordnance Co.*, 3 Ch. 154.

(*h*) *Re Assam Tea Co.*, 10 Eq. 458, 463; *Re Agra, &c., Bank*, 2 Ch. 391; *Higgs v. Assam Tea Co.*, 4 L. R. Ex. 387; *Re General Estates Co.*, 3 Ch. 758; *Re Blakely Ordnance Co.*, 3 Ch. 154; *Re Hercules Insurance Co.*, 19 Eq. 303.

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neglecting to give him timely notice of any fact to which they have been accessory, tending to mislead him as to the real interest of the assignor (*a*).

Negotiable Instruments.—Where an instrument is by the custom of trade transferable like cash by delivery, or by indorsement, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument (*b*). Such instruments are, in the hands of *bonâ fide* holders, *free from all equities*. And in the hands of such a holder it is immaterial whether the person who delivered them either sold them or pawned them; in either case he would pass the property absolute or qualified to such holder (*c*), and mere negligence, on the part of a transferee of a negotiable instrument to avail himself of means at his disposal to detect the bad title of the transferor, cannot be pleaded as a defence to an action on the instrument by the transferee (*d*). The following are negotiable instruments: Bank notes (*e*); Bills of exchange, Promissory notes, Cheques on banker (*f*); Exchequer bills (*g*); Endorsed bills of lading (*h*); Foreign scrip (*i*); Foreign bonds (*k*); Foreign scrip issued by agent in England (*l*); American railway bond with collateral mortgage (*m*).

As to debentures, which may be framed so as to give them many of the incidents of negotiability, see cases below (*n*).

(*a*) *Mangles v. Dixon*, *Ex p. City Bank*, 3 Ch. p. 762; 3 H. L. Cas. 702; *Lewin, Trusts*, 1891, p. 809.

(*b*) See *Crouch v. Crédit Foncier*, L. R. 8 Q. B. p. 381; *Simmons v. London J. S. Bank*, (1891) 1 Ch. p. 294. See *Pollock, Contracts*, 1894, p. 216.

(*c*) *Wookey v. Pole*, 4 B. & A. 14; *Collins v. Martin*, 1 Bos. & P. 618; *London, &c., Bank v. London River Plate Bank*, 21 Q. B. D. p. 510; *Barber v. Richards*, 20 L. J. Ex. 135; *Trenttel v. Barandon*, 8 Taunt. 103; *London J. S. Bank v. Simmons*, (1892) A. C. 201; *Bentineck v. London J. S. Bank*, 9 T. L. R. 262.

(*d*) *Venables v. Baring & Co.*, 1892, 3 Ch. 527; and see *Scholfeld v. Londesborough*, (1895) 1 Q. B. 536.

(*e*) *Miller v. Race*, 1 Burr. 452.

(*f*) See Bills of Exchange Act, 1852.

ss. 8, 38, 73 and 89.

(*g*) *Wookey v. Pole*, 4 B. & A. 1.

(*h*) *Rodger v. Comptoir, &c., de Paris*, L. R. 2 P. C. 405; *Chartered Bank, &c. v. Henderson*, 5 L. R. P. C. 501; *Kemp v. Falk*, 7 App. Cas. p. 581.

(*i*) *Goodwin v. Roberts*, 1 App. Cas. 476.

(*k*) *Gorgier v. Mieville*, 3 B. & C. 45; *A.-G. v. Bouwens*, 4 M. & W. 171; *Hoseltine v. Siggers*, 1 Ex. 856.

(*l*) *Goodwin v. Roberts*, 1 App. Cas. 476; *Lang v. Smyth*, 7 Bing. 284.

(*m*) *Venables v. Baring*, (1892) 3 Ch. 527.

(*n*) *R. Blakeley Ordnance Co.*, 3 Ch. 154; *R. General Estates Co.*, 3 Ch. 758; *Crouch v. Crédit Foncier*, 8 L. R. Q. B. 374; *Chadwyck Healy, Companies*, 1894, p. 174; *Pollock, Contracts*, 1894, p. 212.

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If the instrument on the face of it shows it was only intended to pass by transfer and not by delivery it will not be a negotiable instrument (a). But if it contains a representation on the face of it that all the rights it represents will pass to the holder on delivery, then whether it be a negotiable instrument or not, the person legally entitled may be estopped, on the principle of *Pickard v. Sears &c.*, from disputing the title of the holder (c).

Dividend warrants of the Bank of England being in the form of cheques payable to a particular person without any words to make them transferable are not negotiable (d), nor, it seems, are coupons detached from foreign bonds passing by delivery (e).

The indorsee of an overdue bill of exchange or note takes it subject to all defects of title affecting it at maturity (f).

A person who without inquiry takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument (g). *A fortiori* will this be the result in the case of an instrument not negotiable (h).

Stoppage in transitu.—If a purchaser re-sells goods whilst they are *in transitu*, and receives the price, and then becomes insolvent, the first vendor may stop the goods at any time before they have come into the possession of the second purchaser, unless such second purchaser claims as the indorsee and holder of a bill of lading, in which case, if he has given valuable consideration for the bill, and did not know of the vendor's insolvency, the vendor's right to stop will be gone (i).

(a) *Yeo v. Dawe*, 33 W. R. 739; cf. *Mortgage L. C. v. Commissioner*, &c., 21 Q. B. D. p. 355.

(b) 6 A. & E. 474.

(c) *Goodwin v. Roberts*, 1 App. Cas. p. 490; *Williams v. Colonial Bank*, 38 C. D. p. 388; *Henderson v. Williams*, (1891) 1 Q. B. p. 583.

(d) *Partridge v. Governor and Company of the Bank of England*, 9 Q. B. 396.

(e) *Lang v. Smyth*, 7 Bing. 284.

(f) See Bills of Exchange Act, 1882, s. 36, s. 2. See *Re Euro-*

pean Bank, 5 Ch. 358; *Ex p. Swan*, 6 Eq. 359; overdue cheques, *London, &c. Banking Co. v. Groome*, 8 Q. B. D. 288.

(g) *France v. Clark*, 26 C. D. 257; *Hogarth v. Latham*, 3 Q. B. D. 643; *Hatch v. Searles*, 2 Sm. & G. 147; *Taylor v. G. I. P. R. Co.*, 4 He G. & J. 559; *Williams v. Colonial Bank*, 38 C. D. 388.

(h) *France v. Clark*, *supra*; *Hibblethwaite v. McMorine*, 6 M. & W. 200; *Swan v. N. B. A. Co.*, 2 H. & N. 603.

(i) *Ex p. Golding Davis & Co.*, 13

Ryall v. Rowles.**7. Choses in Action how far made Assignable by Statute.**

It has been before stated generally (see p. 104) what choses in action have been made assignable at law. To the earlier statutes it is unnecessary again further to refer. It may, however, be useful to refer more fully to some recent legislation upon the subject.

By the Policies Assurance Act, 1867 (30 & 31 Vict. c. 144), it is enacted that—

1. "Any person or corporation now being or hereafter becoming entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys."

3. "No assignment made after the passing of this Act shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or in case they have two or more principal places of business then at some one of such principal places of business, either in England, Scotland, or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bona fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed."

4. "Every assurance company shall on every policy issued by them after the 30th of September, 1867, specify their principal place or principal places of business at which notices of assignment may be given in pursuance of this Act."

6. "Every assurance company to whom notice shall have been duly given of the assignment of any policy under which they are liable shall, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators,

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and upon payment in each case of a fee not exceeding five shillings, deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice, and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal officer of the assurance company whose acknowledgment the same purports to be shall be conclusive evidence as against such assurance company of their having duly received the notice to which such acknowledgment relates."

And it is provided by s. 8—"that this Act shall not apply to any policy of assurance granted or to be granted or to any contract for a payment on death entered into or to be entered into in pursuance of the provisions of 16 & 17 Vict. c. 45, and 27 & 28 Vict. c. 43, or either of those Acts (*a*), or to any engagement for payment on death by any friendly society" (*b*).

An agreement in writing to execute on request an effectual mortgage of a policy of assurance deposited with another, at the time of the agreement, as security for a loan, is not an assignment of such policy within the meaning of the Policies of Assurance Act, 1867. Accordingly notice to the assurance company of such an agreement does not under that Act give any priority over a prior equitable mortgagee who has given no notice to the company, but has possession of the policy (*c*). The Act is intended to apply only as between the insurance office and the persons interested in the policy, and does not affect the rights of those persons *inter se*. Accordingly, where a first incumbrancer on a policy has not given such notice as is prescribed by the Act, and a second incumbrancer with notice of the prior charge had given the statutory notice, *North, J.*, held, that the second incumbrancer did not thereby gain priority (*d*). A condition that a policy is not to be assigned in any case whatever, and a proviso that the company are not to be bound to recognise any equitable dealings with the policy, does not prevent a policy-holder dealing with the beneficial interest (*e*).

By the Policies of Marine Assurance Act, 1868, 31 & 32 Vict. c. 86, it is enacted that "whenever a policy of assurance on any ship, or on any goods in any ship, or on any freight, has been

(*a*) These statutes are repealed, in part, by 45 & 46 Vict. c. 51.

(*b*) See *The Scottish, &c., L. A. Society v. Fuller*, 2 Eq. 53.

(*c*) *Spencer v. Clarke*, 9 C. D. 137.

(*d*) *Newman v. N.*, 28 C. D. 674; *Re Holmes*, 29 C. D. 786.

(*e*) *Re Turean*, 40 C. D. 5.

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assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name" . . . (sect. 1).

It has been recently decided that under this Act a policy of marine assurance can be assigned, after loss, so as to entitle the assignee to sue upon it in his own name (*a*). But not after the interest of the assignor has ceased by a delivery of the cargo to the purchaser (*b*), unless there had been an agreement to assign the policy before such interest ceased (*c*).

By s. 50, s.s. 5, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), it is enacted that "where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee" (*d*).

By the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25, sub-s. 6, it is enacted that, "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other *legal* chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities, which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor" (*e*).

This sub-section is retrospective (*f*).

In order to constitute a legal assignment under this section, (1) there must be an *absolute* assignment not purporting to be by way of charge only (*g*). The assignment may be absolute although the deed contains a proviso for redemption and re-assignment (*h*).

(2) The subject-matter of the assignment must be of a debt or

(*a*) Lloyd v. Fleming, 7 L. R. Q. B. 290.

(*b*) North of England, &c., Co. v. Archangel I. Co., 10 L. R. Q. B. 249, 253.

(*c*) *Ib.* 254, per Lush, J.

(*d*) See Palmer v. Locke, 18 C. D. 384, and other cases cited, note (*f*), *supra*, p. 128.

(*e*) See Annual Practice, Part I.

(*f*) Dobb v. Walker, (1893) 2 Ch.

429.

(*g*) See Barlinson v. Hall, 12 Q. B. D. 347; Walker v. Bradford Bank, 12 Q. B. D. 511; Comfort v. Betts, (1891) 1 Q. B. 737.

(*h*) Tancred v. Delagoa Bay, &c., Co., 23 Q. B. D. 239.

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other legal chose in action (*a*). Contracts to lend money or make further advances do not constitute debts (*b*). And see further as to what debts and choses in action are assignable (*c*); and as to assignments of future property, see as to future debts (*d*); as to an interest in maintenance (*e*); as to moneys to become due on a policy (*f*); as to future receipts of business (*g*).

(3) Express notice in writing of the assignment must have been given. The Act, however, does not provide when or by whom it is to be given (*h*). The notice may, however, be given after the death of the assignor, for the meaning of the Act is that, until the assignee has given the prescribed notice, he must sue as he would theretofore have sued; but when the notice is given then he may bring an action at law in his own name without being numbered with having to sue in the name of the assignor, or having to make him a party to the action (*i*). An allegation of notice in writing is necessary in the pleading (*k*).

8. Assignments contrary to Public Policy, Champerty and Maintenance.

General Principle.—"You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting" (*l*).

Pension and Salaries.—As in the case of agreements, the Courts upon the ground of public policy, will not give effect to assignments of pensions and salaries of public officers, payable to them for the

(*a*) See as to legal choses in action, 1 Spence, Eq. Jur. 852; Colonial Bank v. Whinney, 11 App. Cas. 426.

(*b*) Western Waggon Co. v. West, (1892) 1 Ch. 271; May v. Lane, 14 R. March, 232.

(*c*) Brice v. Bannister, 3 Q. B. D. 569; Webb v. Smith, 30 C. D. 192; Harding v. H., 17 Q. B. D. 442; Ingle v. McCutchen, 12 Q. B. D. 519; Knill v. Prowse, 33 W. R. 163.

(*d*) Tailby v. Official Receiver, 13 App. Cas. 523.

(*e*) Re Coleman, 30 C. D. 443.

(*f*) Re Turcan, 40 C. D. 7.

(*g*) *Ex p. Nichol*, 22 C. D. 782; *Re Davis*, 22 Q. B. D. 191.

(*h*) Walker v. Bradford Bank, 12 Q. B. D. 517.

(*i*) *Ib.*, and see Newman v. N., 28 C. D. p. 678; Gearing v. Irwell, 34 C. D. 128; Lee v. Magrath, 10 L. R. 11319; Hudson v. Fernyhough, 61 L. T. 722.

(*k*) Blake Odgers on Pleading, 1894, p. 63.

(*l*) Per Jessel, M.R., Printing, &c., Co. v. Sampson, 19 Eq. p. 465; and see *Re Mirams*, (1891) 1 Q. B. 494.

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purpose of keeping up the dignity of their office, or to assure a due discharge of its duties. But the office must be a public one in the strictest sense, and the pay must come out of national, and not local funds (*a*). The following interests have been held not assignable: The half-pay or full-pay of an officer in the army (*b*); The salary of an assistant parliamentary counsel for the Treasury (*c*); And of a clerk of the peace (*d*); The pension allowed to a retired clerk under the Incumbents' Resignation Act, 1871, c. 44, s. 10 (*e*). A clergyman having the cure of souls is (semble) not a public officer, and the salary of the chaplain to a workhouse payable out of the poor-rate is assignable (*f*).

A distinction has been drawn between half-pay and a retiring pension; the first is inalienable even at common law and therefore not seizable (*g*), but a retiring pension, unless made inalienable by statute, is alienable, and seizable. In *Dent v. Dent* (*h*), the pension of a retired officer was held alienable and therefore liable to sequestration, but this pension was not apparently subject to any statute which made it inalienable. But in *Birch v. B.* (*i*), the pension was inalienable, by virtue of the Army Act, 1881, s. 141, and therefore it could not be taken in execution (*k*).

Where therefore the pension of a retired officer of the State, whether naval, military, or civil, is not made inalienable by statute, it may be alienated, and is therefore seizable, and the pension of a County Court judge (*l*), or of a person who held an appointment in the legal department of the government, is liable to sequestration (*m*). And the

(*a*) *Re Mirams*, (1891) 1 Q. B. 594.

(*b*) *Stone v. Lidderdale*, 9 Aust. 533; *McCarthy v. Goold*, 1 Ball & B. 389; *Collyer v. Fulton*, Turn. & R. 159, 174; *Priddy v. Rose*, 3 M. & W. 102.

(*c*) *Cooper v. Reilly*, 2 S. 560.

(*d*) *Palmer v. Bate*, 6 Moor. 28; 2 Brod. & B. 673; *Hill v. Paul*, 8 Cl. & Fin. 295.

(*e*) *Gathercole v. Smith*, 17 C. D. 1; but see Bankruptcy Act, 1883, s. 52, s. 2; *Re Saunders*, (1895) 2 Q. B. 117; *Ex p. Chick*, 11 C. D. 738, and *Yate-Lee*, Bankruptcy, 1891, pp. 301, 306, 452.

(*f*) *Re Mirams*, (1891) 1 Q. B. 594.

(*g*) *Flarty v. Odium*, supra; *Lidderdale v. Montrose*, 4 T. R. 248; *McCarthy*

v. Goold, 1 Ball & B. 387; *Wells v. Foster*, 8 M. & W. 119.

(*h*) 1 P. & D. 366.

(*i*) 8 P. D. 163.

(*k*) See judgment of *Lindley*, L.J., in *Lucas v. Harris*, 18 Q. B. D. pp. 135, 136; and see *Crow v. Price*, 22 Q. B. D. 429. The Army Act, 1881, s. 141, and the Indian Pensions Act, 1871, ss. 11 & 12, make all pensions, to which those Acts refer, inalienable; but see Bankruptcy Act, 1883, s. 53, s. 2, and *Re Saunders*, (1895) 2 Q. B. 424.

(*l*) *Willcock v. Terrell*, 3 Ex. D. 323.

(*m*) *Sansom v. S.*, 4 P. D. 69; *Wells v. Foster*, 8 M. & W. 132.

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pension of a retired judge of a crown colony, granted by the Secretary of State for the Colonies, and voted annually by the legislature of the colony, vests in the creditors' trustee on his bankruptcy (c).

The salary of a judge, given to him for the support of the dignity of his office, would not be assignable. This seems to have been taken for granted in the case of *Arbuthnot v. Norton* (b), which case, however, was held not to fall within the principles before laid down. There Sir John Norton, a puisne judge of the Supreme Court at Madras, assigned a sum equal to the amount of six months' salary," directed by 6 Geo. 4, c. 85, to be paid to the "legal personal representatives" of such judge, in case he shall die in and after six months' possession of office. It was held by the Judicial Committee of the Privy Council that the assignment was valid, not being within the 5 & 6 Ed. 6, c. 16, and 49 Geo. 3, c. 126. "In giving this opinion," said Dr. Lushington, P. C., "we do not in the slightest degree controvert any of the doctrines, whereupon the decisions have been founded, against the assignment of salaries by persons filling public offices: on the contrary, we acknowledge the soundness of the principles which govern those cases, but we think that this case does not fall within any of those principles: and we think so, because this is not a sum of money which, at any time during the lifetime of Sir John Norton, could possibly have been appropriated to his use or for his benefit, for the purpose of sustaining with decorum and propriety the high rank of life in which he was placed in India. We do not see any of the evils, which are generally supposed would result from the assignment of salary, could in the slightest degree have resulted from the assignment of this sum, inasmuch as during his lifetime his personal means would in no respect whatever have been diminished, but remain exactly in the same state as they were."

So a pension having for one of its objects a perpetual memorial of national gratitude for public services is inalienable. See *Davis v. Marlborough* (c), where it was held by Eldon, C., that the pension granted by 5 Ann. c. 4, "for the more honourable support of the dignities" of the Duke of Marlborough and his posterity payable out of the revenues of the post-office, was inalienable (d).

Where no particular services are to be rendered to the public, an assignment of an interest or pension though derived from the Crown

(a) *Ex p. Huggins*, 21 C. D. 85; see Bankruptcy Act, 1883, ss. 44, 52, 53.

(b) 5 Moore, P. C. C. 219.

(c) 1 Swan. 74.

(d) *Grenfell v. The Dean, &c.*, of Windsor, 2 B. 550.

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or the public, will be supported. In the principal case of *Row v. Dawson* (p. 93, supra), *Hardwick*, C., entertained jurisdiction on the ground that the officer admitted the money to be in his house for the use of the person under whom the litigating parties made their claim (a). It has been held that prize-money was assignable in equity before any interest had vested by grant from the Crown (b). And a pension granted by Government in compensation for the loss of a place in the Customs, was held assignable (c). So an assignment of the emoluments of a fellow of a college in the university was held valid by *Lanngdale*, M. R., who gave effect to the security thereon, out of the dividends apportioned to such fellow, from time to time in respect of his fellowship (d). *Shadwell*, V.-C., seems, however, to have come to a different conclusion in *Berkeley v. King's College* (e).

In the case of *Grenfell v. The Dean, &c., of Windsor* (f), a canon of Windsor granted the canonry profits and emoluments thereof to secure a sum of money. There was no cure of souls, and the only duties were residence within the Castle, and attendance in the chapel, twenty-one days in the year. *Langdale*, M. R., held that the security was valid, and appointed a receiver of the profits (g).

Bankruptcy Act, 1883, ss. 44, 52, and 53.—The effect of these sections is to vest in the trustee in bankruptcy all the property of the bankrupt of whatever nature, subject, however, as to the pay of military, naval, or civil servants, to the qualifications of s. 53 (h).

Alimony.—Alimony granted to a wife by the Divorce Court is not assignable, inasmuch as it is a mere allowance which, having regard to the means of the husband and wife, the Court thinks ought to be paid from time to time for her maintenance, and the Court may alter it or take it away when it pleases (i).

Assignment of future intellectual work.—An agreement by the vendor of a patent to assign to the purchaser of future patent rights which the vendor might thereafter acquire of a like nature to the patent sold, to assign the produce of future intellectual work, is not contrary to public policy (k).

(a) *Priddy v. Rose*, 3 Mer. 103.

(b) *Alexander v. Wellington*, 2 Russ. & M. 35.

(c) *Tunstall v. Boothby*, 10 Si. 512.

(d) *Feistel v. King's College*, 10 B. 491.

(e) Cited 10 B. 490.

(f) 2 B. 544.

(g) *Cf. Harrison v. H.*, 13 P. D. 181;

Re Mirams, (1891) 1 Q. B. 594.

(h) *Yate-Lee*, *Bankruptcy*, 1891, p. 453; cf. *Re Saunders*, (1895) 2 Q. B. 117.

(i) *Re Robinson*, 27 C. D. 160, 161.

(k) *Printing, &c., Co. v. Sampson*, 19 Eq. 462.

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Champerty.—Champerty is a species of maintenance, being a bargain with a plaintiff or defendant, *compam partem*, to divide the land or other matter sued for (*a*). When a person officiously and unwarrantably agrees to furnish money or to aid in the maintenance of an action or suit in order that he may share in the advantages thereof, he is said to be guilty of champerty (*compam partem*). But if the interference does not amount to maintenance there is no champerty although the party tendering the assistance is to receive the money recovered in the action (*b*). The Courts will not give effect to assignments which partake of the nature of champerty or maintenance. In *Stevens v. Baywell* (*c*), one-fifth part of the share of prize-money, the subject of a suit then depending in the Admiralty Court, was assigned by the executrix of one of the captors, and her husband, to Navy agents, in consideration of their indemnifying them from all costs on account of any suit touching the said prize-money, and paying to them the remaining four-fifths, if it should be recovered; *Grant*, M.R., held that the assignment was void, as amounting to that species of maintenance which is called champerty, viz., the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it (*d*).

And the purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced in equity (*e*).

Maintenance.—Is “the unlawful maintenance of a suit in consideration of a bargain for part of the thing or some profit out of it” (*f*). The rule as to maintenance is not so much founded on general principles of right and wrong as upon considerations of public policy. It is “that parties shall not by their countenance aid the prosecution of suits of any kind which every person must bring upon his own bottom and at his own expense” (*g*). All the cases on the subject

(*a*) See *Radeliffe v. Anderson*, El. B. & E. 283; *Guy v. Churchill*, 40 C. D. p. 480.

(*b*) *Williams v. Protheroe*, 3 Y. & J. 129; *Addison, Contracts*, 1892, p. 76; *Pollock, Contracts*, 1894, p. 319.

(*c*) 15 V. 139.

(*d*) And see *Skapholme v. Hart*, Cas. t. Finch, 477; *Strachan v. Brander*, 1 Eden, 303; *Wood v. Downes*, 18 V. 120, 123; *Stone v. Yea*, Jac. 426; *Bayly v.*

Tyrell, 2 Ball & B. 362; *Hartley v. Russell*, pp. 150, 151, *infra*; *Earle v. Hopwood*, 9 C. B. (N. S.) 566; *Hutley v. H.*, 8 L. R. Q. B. 112.

(*e*) *De Hoghton v. Money*, 2 Ch. 164.

(*f*) Per *Grant*, M.R., *Stevens v. Bagwell*, 15 V. 139; and see *Bradlaugh v. Newdegate*, 11 Q. B. D. p. 5.

(*g*) Per *Loughborough*, C., in *Wallis v. Portland*, 3 V. 494; 4 R. R. 78.

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are founded on the principle "that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce" (a). In *Bradlaugh v. Newdegate* (b), the defendant N., a member of parliament, procured C., a person of no means, to sue B., who was also a member, for certain penalties, N. giving C. a bond of indemnity against all costs and expenses. The action was brought and failed. Thereupon B. sued N. for maintenance and succeeded. See the elaborate judgment of *Coleridge, C.J.*

The assignment of a *bare right* to file a bill in equity for a fraud committed upon the assignor, will be held void, as contrary to public policy, and as savouring of maintenance (c). It has been decided in the United States, that a mere right of action for a tort is not, for a like reason, assignable (d). So a mere assignment of a right to sue a trustee for the chance of recovering from him interest or profits of part of the trust funds which were for a certain period in his hands, has been held invalid (e). So likewise it has been held that the assignment by a creditor of a company who has presented a petition to wind it up, of his debt and also his right to proceed with his petition, is invalid (f).

The general rule is clear, but very various exceptions have been allowed by judicial decisions to be defences to actions for maintenance. The following are some of the principal of these. Where the person has an actual valuable interest in the subject-matter of the suit, either present or contingent, or future (that is, an interest recognized by law, not a mere sentimental interest); or the interest which consanguinity or affinity to the suitor gives to the man who aids him; or the interest arising from the connection of the parties, as master and servant; or that which charity and compassion gives a man in behalf of a poor man, who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them (g); or the case must be brought within some of the specific instances which

(a) Per *Abinger, C.B.* in *Prosser v. Edmonds*, 1 Y. & C. 481; and see *James v. Kerr*, 40 C. D. 457. 64; *Keogh v. McGrath*, 5 L. R. Ir. 478.

(b) (1883) 11 Q. B. D. 1.

(c) See *Prosser v. Edmonds*, 1 Y. & C. Ex. Ch. 481; *Powell v. Knowler*, 2 Atk. 226; *Kenny v. Browne*, 3 Ridg. 1, C. 462, 498, 501; *Bayly v. Tyrrell*, 2 Ball & B. 363; *Stanley v. Jones*, 7 Eng. 309; *Sprye v. Porter*, 7 El. & Bl. 38; *Twiss v. Noblett*, 4 Ir. R. Eq.

(d) *Gardner v. Adams*, 12 Wend. R. 297.

(e) *Hill v. Boyle*, 4 Eq. 260, 263.

(f) *Re Paris Skating, &c., Co.*, 5 C. D. 959.

(g) See *Bradlaugh v. Newdegate*, supra; *Harris v. Brisco*, (1886) 17 Q. B. D. 504, and the cases, p. 147, infra.

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have been established as exceptions (*a*). In *Alabaster v. Harness* (*b*), defendant H. had employed T. to report, as an expert, upon certain electrical appliances in which he, H., was greatly interested. The plaintiff A. criticized this report, and commented adversely upon T.'s qualifications. T. brought an action for libel against the plaintiff A., at the instigation of H., who found the money. The action went against T., and thereupon the plaintiff A. brought this action for maintenance against H. Held that H. had no "common interest" with T. in the action for libel, and was therefore not entitled to maintain T. in bringing the libel action; and see further as to "common interest" (*c*). Other specific exceptions have been established, for instance, the purchase of an interest, *pendente lite* (*d*), or a mortgage (*e*); but a purchase for the sake of maintaining a suit relating to the property purchased is void (*f*). In short, "the sale of an interest to which a right to sue is incident is good, but the sale of a mere right to sue is bad" (*g*). So where there exists between the parties the relationship of father and son, or heir-apparent (*h*), or master and servant (*i*), at any rate where the advance is made from wages in the hands of the master, or the master is in fear of losing the services of the servant through attachment or otherwise (*k*), or it seems where the cause of action arose out of some ministerial act done in the character of a servant (*l*), the proceedings will not be considered as within the rule as to maintenance or champerty (*m*).

A bankrupt whose adjudication has not been set aside, cannot maintain an action for maintenance on the ground that the defendant incited and supported bankruptcy proceedings in which he had no common interest, since the cause of action (if any) passed to the

(*a*) See judgment of Coleridge, C.J. in *Bradlaugh v. Newdegate*, 11 Q. B. D. p. 11, and of Esher, M.R., and Lopes and Rigby, L.JJ. in *Alabaster v. Harness*, (1895) 1 Q. B. 339.

(*b*) (1895) 1 Q. B. 339.

(*c*) *Hunter v. Daniel*, 4 Ha. 420; *Secar v. Lawson*, 15 C. D. 426; *Hutley v. H.*, L. R. 8 Q. B. 112; *Guy v. Churchill*, 40 C. D. 481; *Wallis v. Portland*, *supra*.

(*d*) *Williams v. Protheroe*, 5 Bing. 309; *Wood v. Griffith*, 1 Swan. 36; *Knight v. Bowyer*, 2 De G. & J. 421, 445; *James v. Kerr*, 40 C. D. p. 457.

(*e*) *Cockell v. Taylor*, 15 B. 103,

117; see *James v. Kerr*, *supra*.

(*f*) *De Hoghton v. Money*, 2 Ch. 164; *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; *Harrington v. Long*, 2 My. & K. 590.

(*g*) *Pollock, Contracts* (1894), p. 325; *Tyson v. Jackson*, p. 150, *infra*.

(*h*) *Burke v. Green*, 2 Ball & B. 521; *Moore v. Fisher*, 7 Si. 384.

(*i*) *Wallis v. Portland*, 3 V. 503.

(*k*) *Vin. Abr. Maintenance*, K.

(*l*) *Elborough v. Ayres*, 10 Eq. 367, 371, 375.

(*m*) See also *Wilson v. Short*, 6 Ha. 366; *Dickinson v. Burrell*, 35 B. 257.

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trustee in bankruptcy; and such an action may be summarily dismissed upon summons as frivolous and vexatious (*a*). And it seems that a corporation in liquidation as distinct from the individual liquidation, is incapable of committing such an act of maintenance (*b*).

Under the Bankruptcy Act, 1883, ss. 44, 56, the trustee can assign the subject-matter of an action which he has already commenced without coming within the rule against champerty or maintenance (*c*).

Under the Companies Act, 1862, s. 95, claims which a company may have against its directors, for improper dealings with the assets of the company, as for instance improper sales or purchases by them as fiduciaries, are choses in action which may be sold by the official liquidator, even although the existence of the claim was not known when the assignment was executed (*d*). An agreement by a shareholder in a company which is being compulsorily wound up, that, in consideration of a pecuniary equivalent, he would endeavour to postpone the making of a call, or would support the claim of a creditor, was held by the Court of Common Pleas to be illegal, as being contrary to the policy of the Winding-up Acts (*e*); and *semble*, per *Willes, J.*, that such agreement was also void as being within the spirit of the law against maintenance (*f*).

A purchase by the solicitor of the subject-matter of the suit *pendente lite* is invalid (*g*). In *Davis v. Freethy* (*h*), an action had resulted in a verdict for M., a plaintiff, for 250*l.* The next day, for valuable consideration, M. assigned the 250*l.* to Davis, and Davis gave notice to the debtor. A new trial was ordered, and Davis, who was a solicitor, then became the solicitor of M. The trial resulted in a verdict for M. for 250*l.* Held, the assignment was valid, because at the date of it the relation between the parties was not that of solicitor and client; *Simpson v. Lamb* approved but distinguished. The Solicitors' Remuneration Act, 1881, s. 8, does not affect the principle of *Simpson v. Lamb* (*i*). In *James v. Kerr* (*k*), a man in

(*a*) *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; *Whitworth v. Hall*, 2 B. & Ad. 695.

(*b*) *Metropolitan Bank v. Pooley*, *supra*.

(*c*) *Seear v. Lawson*, 15 C. D. 426; *Guy v. Churchill*, 40 C. D. 481.

(*d*) *Re Park Gate, &c., Co.*, 17 C. D. 234, cf. *New Westminster Brewery v. Hannah*, W. N. (76) 215, (77) 35.

(*e*) *Elliott v. Richardson*, 5 L. R.

C. P. 744.

(*f*) *Ib.* 748.

(*g*) *Wood v. Downes*, 18 V. 120; *Simpson v. Lamb*, 7 El. & Bl. 84; and see *Hall v. Hallett*, 1 Cox, 134; *Knight v. Bowyer*, 2 De G. & J. 421.

(*h*) 24 Q. B. D. 519.

(*i*) Per *Esher, M.R.*, in *Davis v. Freethy*, *supra*.

(*k*) 40 C. D. 449.

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poor circumstances arranged with K., a solicitor, to advance him money for the purpose of conducting his defence in an action. In consideration of certain advances he mortgaged the property which he might recover with the advances, and a bonus of 225/, and covenanted to employ a particular person as his solicitor. He recovered the property and commenced an action to redeem. Held, the mortgage was tainted with maintenance (c), and redemption was ordered on payment of sums actually advanced. An assignment, however, of the subject-matter of a suit *pendente lite* to an attorney by way of *security*, as for instance for payment of his costs, will be valid, although according to the authorities before cited a sale to him would have been void (a). An assignment of a debt even to an attorney, after a judge's order for payment, but before the order was made a rule of Court, was, if there was no other objection to the transaction, held valid, as not being within the mischief of the rule which prevents parties assigning property in a suit to an attorney while the proceedings are pending (b).

Although the suit of a person claiming under a title founded on champerty and maintenance will fail, a person who has originally a good title to sue will not lose it by having entered into a bargain savouring of champerty and maintenance with the solicitor he employs in the suit (c). There the plaintiff agreed with Wright, a solicitor, to give him a portion of the profits arising from the successful prosecution of a suit to establish his right to certain coal mines, upon being indemnified against the costs of the proceedings. It was held by *Mallins*, V.-C., that although the contract amounted to champerty and maintenance, the plaintiff was not disqualified from suing the person in possession of the mines, because his title was anterior to the illegal contract, but that if the solicitor had been, the party suing his bill would have been dismissed, inasmuch as he would have claimed through such contract (d).

Although by the Attorneys and Solicitors Act, 1870, s. 4, and the Solicitors' Remuneration Act, 1881, s. 8, solicitors may, under certain restrictions, make agreements with their clients as to

(z) 40 C. D. 458.

(a) *Anderson v. Radcliffe*, 28 L. J. (Q. B.) N. S. 32. Cf. G. Order under Solicitors' Remuneration Act, r. 7.

(b) *Smith v. Selwyn*, 5 W. R. 682 (Q. B.).

(c) See *Hilton v. Woods*, 4 Eq. 432.

(d) See also *Harrington v. Long*, 2

My. & K. 590; *Stanley v. Jones*, 7 Bing. 369; *Reynell v. Sprye*, 8 Ha. 222; *Sprye v. Porter*, 7 El. & Bl. 58; *Simpson v. Lamb*, *supra*; *Strange v. Brennan*, 15 St. 346; *Harlow v. Hopwood*, 9 C. B. (N. S.) 566; *Davis v. Freethy*, *supra*, p. 148.

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remuneration in lieu of costs; the law as regards contracts void as between attorney and client for champerty or maintenance appears to be unaffected thereby. See s. 11 of the Act of 1870, which enacts that, "Nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action, or proceeding" (a).

An agreement by an heir-at-law and devisee out of possession, where it is doubtful in which of them the right is vested, to recover the estate and divide it between them, is contrary to the policy of the law, as well as the statute of 32 Hen. 8, c. 9, against pretended titles. See *Cholmondeley v. Clinton* (b), where Lord *Redesdale* observed, that such persons are incompetent to make a bargain upon the subject affecting any person except the person in possession, that they are both competent to make a composition with him if he thought fit, but competent to deal with no other person by the statute, which is only an affirmance of the common law upon the subject of pretended titles by adding penalties (c). But an heir-at-law may maintain the title of the person in possession (d), and the sale of a contingent right or mere expectancy not being an adverse claim is good (e).

Where a legatee too poor to sue, assigned the legacy for less than it was worth to the plaintiff, who bought it for the purpose of enforcing payment by suit, it was held that this did not amount to champerty or maintenance (f).

Where a creditor who had instituted proceedings at law and in equity against his debtor, entered into an agreement with the debtor to abandon those proceedings, and give up his securities, in consideration of the debtor giving him a lien on securities in the hands of another creditor, with authority to sue such other creditor, and agreeing to use his best endeavours to assist in adjusting his accounts with the holder of the securities, and in recovering his securities, by *Leach*, V.-C., held that the agreement did not amount

(a) See *In re Attorneys and Solicitors Act*, 1870, 1 C. D. 373; *Davis v. Freethy*, supra, p. 148.

(b) 4 Bli. 1, 42, 43, 90, 123.

(c) Sugd. Prop. 74.

(d) See judgment of *Ripley*, L.J. in

Alabaster v. Harness, (1895) 1 Q. B. p. 346.

(e) *Cook v. Field*, 15 Q. B. 460; *Pollock, Contracts*, 1894, p. 328.

(f) *Tyson v. Jackson*, 30 B. 384; and see *Pollock, Contracts* (1894), p. 325.

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to champerty, but would have done so, if it had stipulated that the creditor should maintain the proceedings instituted by the debtor against the holder of the securities, in consideration of the profits to be derived by the debtor from the suit (a).

India.—The English laws of maintenance and champerty are not of force as specific laws in India, and a fair agreement there to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded *per se* as opposed to public policy (b). But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid (c).

(a) *Hartley v. Russell*, 2 S. & S. Canto. &c., 2 App. Cas. 186, 208.
244.

(c) *Ib.* 186, 209.

(b) *Ram Coomar, &c. v. Chunder*

HORNSBY v. LEE.

1816. 2 Mad. 16.

Assignment of Wife's Choses in Action.—Reduction into Possession.

Husband and wife assign a reversionary interest of the wife in certain trust stock, as security for the payment of an annuity granted by the husband, the husband afterwards takes the benefit of the Insolvent Debtors Act, and a general assignment is made of his property. The person on whose death the wife was to take dies, and then the husband dies without having done any other act to reduce the stock into possession. Held, that his wife was entitled by survivorship to the stock against both the particular and the general assignee.

BY indenture, 1st January, 1774, between Deacon and Collier, assignees of Baptist Darwin, a bankrupt (the father of the plaintiff), of the first part; the said Baptist Darwin and S. Darwin, his wife (the mother of the plaintiff), of the second part; and Mary Petty, R. Petty, J. Elliott, and G. Hooper of the third part. Deacon and Collier granted, &c., unto the said M. Petty, R. Petty, J. Elliott, and G. Hooper, 422*l.* 6*s.* 3*d.* Four per cents., together with the dividends, to hold the same upon trust, to apply the dividends for the separate use of S. Darwin during her life, and after her death, to apply the principal and dividends among all and every such child and children of the said B. Darwin by the said S. Darwin, as should be then living, in equal shares, payable at twenty one; but if either of the children should die before his or their shares should become payable, the shares of him, her, or them so dying, to be paid to the survivors; and if only one child who should live to attain twenty-one, then the principal sum and the dividends to be paid to such only child. By the same indenture, Deacon & Collier granted, &c., to the said M. Petty, R. Petty, J. Elliott, and G. Hooper, certain shares in a messuage, and all the assignee's right, title, and interest in, and to the real estate late of Richard Petty (the father of the said S. Darwin), and the moiety, or half part of the share and proportion of them, the said assignees, of, in, and to a certain sum of 2,762*l.* 11*s.* 3*d.*

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upon the same trusts as were declared respecting the 422*l.* 6*s.* 3*d.* Four per cents.

The plaintiff and Anne Mary Darwin were the only issue of Baptist and Sarah Darwin. Baptist Darwin died in 1782. In 1787, the plaintiff married Nathaniel Hornsby, without a settlement, and in February, 1799, *the plaintiff and her husband assigned over a moiety of their interest in the said trust funds*, upon the contingency of the plaintiff surviving her mother, unto the defendant, John Parker, as a collateral security for the due payment of an annuity of 30*l.* granted by the plaintiff's husband, Hornsby, to Parker during his life, in consideration of 200*l.* paid to Hornsby.

In 1790, Anne Mary Darwin married John Patten.

In 1801, Thomas Ralph and the defendant George Lee were appointed trustees, and the trust monies, which then consisted of 1,453*l.* 15*s.* 6*d.*, 3*l.* per cents. were transferred to them.

Anne Mary Patten died in 1807, and Sarah Darwin (the mother) died early in February, 1814 (a).

The plaintiff's husband, Hornsby, was confined in the King's Bench Prison for debt, and in January, 1814, was discharged under the Insolvent Act, and his estate and effects vested in a clerk of the peace, and the same were by him assigned to the defendant, John Seton.

Hornsby afterwards, 16th February, 1814, died without having instituted any proceedings, or done any act to reduce the trust fund into possession, in the short interval—a few days only—between the widow's death and his own.

Thomas Ralph died 24th March, 1814.

The bill stating these facts prayed, that the trust funds, with the dividends, might be transferred to the plaintiff; or if the Court should be of opinion that the defendants, Parker and Seton, or either of them, were entitled to them, then that the plaintiff might be decreed to have a settlement out of the same.

The defendant Parker, by his answer, insisted that the dividends and interest of the moiety of the trust monies assigned to him, ought to be applied pursuant to the trusts declared as to the same, in and by the indenture of the 26th of February, 1799, and stated, that 314*l.* 3*s.* 6*d.*

(a) The particular day of her death does not appear on the pleadings.

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was due to him for ten years and a half arrears of the annuity, and claimed to be paid the same out of the trust monies.

The defendant Seton, by his answer, submitted, that the trust funds ought to be transferred to him as the assignee of the estate and effects of Hornsby, for the benefit of himself and the rest of the creditors.

The defendant Lee, the trustee, submitted to act as the Court should direct.

Mr. *Cooke* and Mr. *Richards* for the plaintiff.—The plaintiff claims the whole of this property, as having survived to her. This being a reversionary interest, the husband could not reduce it into possession, or part with it before the death of Sarah Darwin, the mother; and after her death, a few days before his own, he did no act to reduce the property into possession. Neither the particular assignment to Parker, nor the general assignment under the Insolvent Act to Seton, operated as a reduction into possession. In *Mitford v. M. (a)* it was determined, that the general assignment in bankruptcy had not the effect of reducing into possession a legacy of stock left in trust for the benefit of the bankrupt's wife, and her right by survivorship was established against the assignees. The same principle must apply to all assignments, whether under the Insolvent Debtors Act or to a particular assignee. They cited also *Wildman v. W. (b)*, and *Woollands v. Crowcher (c)*.

The plaintiff, by joining in the assignment to Parker, has not affected her claim; for being a married woman, the deed was inoperative as to her.

Mr. *Leach* and Mr. *Dowdeswell*, for the defendant Parker.—The assignment to Parker of this reversionary interest, as a security for the payment of the annuity granted to him, was valid. In *Wright v. Morley (d)* an assignment by the husband of his interest, and right of his wife, was held good, subject to the wife's equity to a settlement. That, it is true, was a present interest; but whether the interest to which the husband is entitled in right of his wife be

(a) 9 V. 87.

(b) 9 V. 174; 7 R. R. 153.

(c) 12 V. 174.

(d) 11 V. 12; 8 R. R. 69.

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present or reversionary, makes no difference. In both cases his assignment is effectual, subject to the wife's equity to a settlement.

Mr. *Trouce*, for the defendant Seton.—After the determination in *Mitford v. M. (a)*, I cannot contend that this interest passed by the assignment under the Insolvent Debtors Act; but this defendant, not having asserted any right to this property, and being made a party against his desire, ought to have his costs.

Mr. *Shadwell*, for the trustee, asked for his costs.

SIR THOMAS PLUMER, V.-C. E.—[After stating the facts of the case.] Independently of authority, let us consider, upon principle, whether the husband's assignment of his wife's contingent interest is good. The husband has a right to his wife's choses in action, provided he reduces them into possession. Is a deed assigning a reversionary interest a reduction into possession? It is impossible actually to reduce a reversionary interest into possession. Is it then a constructive reduction into possession? *The assignment puts the assignee of the husband in the same situation as the husband*, and if the husband survives the wife, the assignee is entitled to the property; but here the husband died before the wife, and the assignee therefore is not entitled to the property. This is the manner in which the case strikes me upon principle.

According to *Mitford v. M. (b)*, it is clear, that the general assignment in bankruptcy does not pass a reversionary interest in the wife, she surviving her husband. It must be the same as to the assignment under the Insolvent Debtors Act. Nor do I see what answer can be given to the observation of Mr. *Cooke*, that a particular assignee cannot be in a better situation than an assignee under the general assignment in bankruptcy. The case cited of *Woodlands v. Croucher (c)* is strong to show the insufficiency of the assignment to bar the wife's claim in case she survives her husband. On principle and authority the plaintiff is entitled to this money.

The decree was as follows: Declare the plaintiff is entitled to 1,453*l.* 15*s.* 6*d.*, 3*l.* per cent. Reduced annuities in the pleadings

(a) 9 V. 87.

(b) Ibid.

(c) 12 V. 174.

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mentioned, standing in the names of Thomas Ralph, in the pleadings named, and the defendant, George Lee, in the books of the Governor and Company of the Bank of England. And it is ordered that the defendant, George Lee, do transfer the said 1,453*l.* 15*s.* 6*d.*, 3*l.* per cent. Reduced annuities, unto the plaintiff, with interest and dividends which have accrued due thereon. And it is ordered that the plaintiff do pay unto the defendants George Lee and John Seton, their costs of this suit, to be taxed by Mr. Campbell, one of the masters of this Court, as between solicitor and client; and as between the plaintiff and defendant John Parker, no costs on either side; and any of the parties are to be at liberty to apply to this Court, as they shall be advised.

NOTES.

1. Generally.
2. Reduction into possession. p. 157.
3. Chose in action of married woman—How far assignable, p. 161.

1. Generally.

This note deals only with cases on the assignment of a wife's *choses in action* where the marriage took place before the 1st January, 1883 (*a*). In such a case the husband acquired by the fact of such marriage: 1. An estate of freehold in the real property of his wife. 2. An estate by the curtesy in lands of which his wife was seized in fee simple or fee tail during the coverture. 3. An interest in her copyholds, and customary freeholds, and an estate therein if he survived her, varying with the custom. 4. An absolute interest in her chattels personal in possession. 5. A qualified interest in her chattels real, and choses in action (*b*).

As to her choses in action, present and reversionary, not belonging to her to her separate use, if the husband does not during his lifetime reduce them into possession, they will belong to his wife surviving him (*c*), for marriage only makes a *qualified* gift to the husband of the wife's choses in action, namely, upon condition that he reduce them into possession during its continuance (*d*). In chattels, personal marriage

(*a*) See the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 25.

(*b*) *Re Butler's T.* (1888), 38 C. D. 286, and *Thacknесс*, *Hus. & W.* (1884),

p. 44.

(*c*) Co. Litt. 351; *Scuwin v. Blunt*, 7 V. 294; *Langham v. Nenny*, 3 V.

467.

(*d*) *Purdew v. Jackson*, 1 Russ. 1.

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by operation of law divests the property in them out of the wife. In the case of a chose in action, marriage does not divest the property out of the wife, and all that the husband acquires by the marriage is a *right* to reduce the chose in action into possession (*a*). But at any time before the husband has actually reduced the equitable interest into possession, the wife may, if the chose in action is a present interest, assert her equity to a settlement (*b*).

If the husband survive his wife (*c*) he will on taking out administration (*d*) be entitled to her chosses in action, not reduced into possession.

2. Reduction into Possession.

What does not amount to.—In order to reduce a wife's chosses in action into possession, acts must be done which will have the effect of changing the property therein, and divesting the wife's right. For nothing amounts to a reduction into possession which does not give the husband, for some moment of time, *absolute* dominion over the property without any concurrence of the wife (*e*). In the following cases it has been held that there has not been reduction into possession.

The mere intention of an executor to pay the proceeds of a chose in action to which the wife is entitled to the husband, or an appropriation of a particular fund for that purpose (*f*), or the husband's receipt of the interest thereof (*g*), or a receipt of part of the fund by the husband, except *pro tanto* (*h*). Where the wife was entitled to a legacy expectant on death of B., and she joined with her husband in assigning it to X., and the husband died in 1819, living the tenant for life, it was held that the wife was entitled free from the incumbrance of X. (*i*). Where the chose in action, a promissory note, was handed to the husband (*k*). A transfer of stock

(*a*) See judgment of Bowen, L.J., *Re Butler's T.*, 38 C. D., p. 294; and see *Re Barton's Will*, 10 Ha. 12.

(*b*) As to which, see *Elibank v. Montolien*, post.

(*c*) See as to proof of survivorship *Scrutton v. Patillo*, infra.

(*d*) See (*n.*) "Administration by husband," p. 161.

(*e*) *Nicholson v. Drury*, 7 C. D. p. 55. See *Aitchison v. Dixon*, 10 Eq. p. 598; *Williams' Executors*, 1893, p. 745.

(*f*) *Blount v. Bestland*, 5 V. 515.

(*g*) *Howman v. Corio*, 2 Vern. 190; *Blount v. Bestland*, 5 V. 515; *Hart v. Stephens*, 9 Jur. 225.

(*h*) *Nash v. N.*, 2 Madd. 153, 159; *Scrutton v. Patillo*, 10 Eq. 369, 373; *Parker v. Lechmere*, 12 C. D. 206.

(*i*) *Purdew v. Jackson*, 1 Russ. 1.

(*k*) *Nash v. N.*, 2 Madd. 153; *Godfray v. Madeley*, 6 M. & W. 423; *Day v. Pargrave*, 3 M. & S. 395.

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by trustees or executors into the name of the married woman (*a*). A transfer of money in Court to the joint account of the husband and wife (*b*). A transfer of shares into the joint names of husband and wife (*c*). A transfer of money into names of husband and wife (*d*). Where trustees of a fund belonging to the wife simply retain it in their own hands (*e*), or invest or pay it into the names of trustees for her (*f*). The payment by executors of a legacy bequeathed to a wife, by means of a cheque drawn to the order of the husband and wife, endorsed by them, and handed by the wife to the manager of a bank, directing him, with the assent of the husband, to place it to an account in her sole name, which was done, and treated by the wife as her separate property (*g*).

A mere agreement moreover to sell a fund (*h*), or a set-off of a debt of the husband's due to a testator against a legacy he has left to the wife, will not bar the wife's right to the legacy in case she survives her husband (*i*). It is laid down, however, in a subsequent report of the last cited case, that where a debt to the estate of the testator may be set off by the executors against a legacy bequeathed by the testator to the debtor, such debt may also be set off against a legacy bequeathed by the testator to the wife of the debtor, subject to her equity (if any) to a settlement (*k*). And the mere proof by a husband against the estate of a bankrupt indebted to his wife, will not amount to reduction into possession by the husband, if he die before a dividend be made. For instance, J. S., indebted by bond to the wife of A., became a bankrupt. The husband proved the debt, and paid contribution money, but died before any dividend was made. The wife survived, and died also before any distribution. *Cooper*, L.C., held that the payment of contribution money by the husband did not alter the property of the debt, but that it remained a chose in action, and survived to the wife (*l*).

What does amount to.—The receipt, however, by the husband of his

(*a*) *Wildman v. W.*, 9 V. 174; 7 R. R. 153; see *Ryland v. Smith*, p. 159, *infra*.

(*b*) *Prole v. Soady*, 3 Ch. 220; *Nicholson v. Drury, &c., Company*, 7 C. D. 43. Cf. *Donnelly v. Foss*, *infra*.

(*c*) *Nicholson v. Drury*, 7 C. D. 48.

(*d*) *Scrutton v. Patillo*, 19 Eq. 369.

(*e*) *Twisden v. Wise*, 1 Vern. 161.

(*f*) *Aitchison v. Dixon*, 10 Eq. 589.

(*g*) *Parker v. Lechinere*, 12 C. D. 256.

(*h*) *Harwood v. Fisher*, 1 Y. & C. Ex. Ca. 110. See note (*d*), p. 161.

(*i*) *Harrison v. Andrews*, 13 Si. 595; *Carr v. Taylor*, 10 V. 574; *Ex p. Blagden*, 2 Roso, 249; *Ex p. O'Ferrall*, 1 G. & J. 347; *Reeve v. Richer*, 11 Jur. 960; *Re Batchelor*, 16 Eq. 481; *M'Mahon v. Burchell*, 3 Ha. 99.

(*k*) *M'Mahon v. Burchell*, 5 Ha. 325; and see *Hall v. Hill*, 1 Dr. & War. 109.

(*l*) See *Anon.*, 2 Vern. 706.

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wife's chose in action, as, for instance, of a sum due to her on a mortgage in fee, will be a reduction thereof into possession (a), unless such receipt by the husband be in the character of trustee, when it will not have that effect (b).

The receipt by an *agent* appointed by the husband and wife, either of a legacy due to the wife (c), or of money forming part of the estate of an intestate, of which the wife is administratrix, will amount to a reduction into possession by the husband in the former case, of the legacy, in the latter, of the wife's distributive share of the money (d), unless the agent receives the money as the separate property of the wife (e), and receipt by the wife of a chose in action with the assent of the husband, will amount to a reduction into possession by the husband (f).

A transfer of the wife's stock into her husband's sole name would be a reduction into possession (g), and where the husband was a lunatic, the payment by order of the Court of stock belonging to the wife to the credit of the lunacy, was held as much a reduction into possession as a payment to the lunatic or his committee (h). It has however been held in Ireland that fines due to the wife before marriage, which had been lodged in Court, remained choses in action, and were not reduced into possession by such lodgment (i).

And as a husband may, by transferring his wife's stock into his own name, reduce it into possession, so he may do so by transferring it into the names of trustees upon trusts inconsistent with his wife's title by survivorship (k).

Where, however, a husband directs or consents to an investment of stock belonging to his wife, in a manner *consistent with her equities*, he will not be considered by such an act as destroying such equities, by its being a reduction into possession. Thus in *Ryland v. Smith* (l), the wife being under a will entitled to stock and to cash, part of a residue, the executors, at the request of the husband, transferred the stock into the names of trustees for the wife's separate use, and paid the cash to the husband. The husband employed part of the

(a) *Rees v. Keith*, 11 Si. 388, 390.

(b) *Baker v. Hall*, 12 V. 497, 8 R. R. 366; *Wall v. Tomlinson*, 16 V. 413, 10 R. R. 212.

(c) *Huntly v. Griffith*, Moore, Q. B. 452, Gouldsb. 2nd ed., p. 159, pl. 91.

(d) *Re Barber*, 11 C. D. 442.

(e) *Parker v. Lechinere*, 12 C. D. 256.

(f) *Rogers v. Bolton*, 8 L. R. Ir. 69, *infra*, p. 160.

(g) 1 Bright's Husb. & W. 54.

(h) *Re Jenkins*, 5 Russ. 183, 187.

(i) *Donnelly v. Foss*, 7 L. R. Ir. 439.

(k) *Hansen v. Miller*, 14 Si. 22; *Burnham v. Bennett*, 2 Coll. Ch. R. 254.

(l) 1 My. & C. 53.

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cash in increasing the amount of the stock. He afterwards became bankrupt, and died. It was held by *Pryps*, M.R., that the stock transferred by the executors was not reduced into possession by the husband, and, therefore, belonged to the wife by survivorship, but that the assignees under the bankruptcy were entitled to the increase made by the husband.

Where the wife is possessed of choses in action even such as promissory notes, or bills of exchange given to her *before marriage*, unless the contracts thereon be altered as by taking a new security (*a*), the husband must bring an action upon them in the names of himself and his wife, and if he obtains judgment and sues out execution, he will thereby reduce such choses in action into possession (*b*). but if he die after judgment and before execution sued out, the judgment will survive to the wife (*c*). Where, however, the choses in action accrue to the wife *during the marriage*, and the husband elects to disagree to his wife's interest by commencing an action in his own name only, if he dies after judgment, his representatives, and not his wife, will be entitled to the benefit thereof (*d*).

Where a promissory note made to a feme sole (and not being her separate property) was paid to her after marriage, but without the authority of her husband, such payment was held to be no answer to an action brought after her decease by her husband as her administrator on the footing of the note, inasmuch as the act of the wife in receiving during coverture the debt contracted with her *dum sola* operated as a reduction into possession of the chose in action, and vested the property in the husband (*e*).

Where there is a decree in a joint suit by husband and wife, for money claimed in her right, if the husband die before any other proceedings, the benefit of the decree will survive to the wife (*f*); nor will her right by survivorship be prejudiced if nothing has been done in the suit to change the property (*g*). If, however, the property were changed, as, for instance, by the approval by the Court of a settlement to be made on the wife (*h*); or by an order for payment

(*a*) *Yard v. Ellard*, 1 Salk. 117, pl. 8.

(*b*) *Hardy v. Robinson*, 1 Keb. 440; *Tirell v. Bennet*, 2 Keb. 89; *Milner v. Milnes*, 3 T. R. 627; *Rumsey v. George*, 1 M. & S. 176; *Sherrington v. Yates*, 12 M. & W. 855.

(*c*) *Bond v. Simmons*, 3 Atk. 21. Cf. R. S. C. 1883, O. 17, r. 1.

(*d*) *Oglander v. Buxton*, 1 Vern. 396.

(*e*) *Rogers v. Bolton*, 8 L. R. Ir. 69.

(*f*) *Nauney v. Martin*, 1 Eq. Ca. Ab. 68.

(*g*) *Adams v. Lavender*, McCle. & Yo. 41; *Bond v. Simmons*, 3 Atk. 20; *Anon.*, 3 Atk. 726; *Macaulay v. Philips*, 4 V. 15; see 7 R. R. 349.

(*h*) *Macaulay v. Philips*, 4 V. 19.

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to the husband, the wife's right to take by survivorship will be gone (*a*).

Arrears of income of a married woman's life interest, in the hands of a receiver, which had been ordered to be received and applied by him in a suit in payment of her husband's incumbrances, and which had not been paid as directed, were held by the effect of the order, to be reduced into possession so as to defeat the wife's right by survivorship (*b*).

A sale by a husband for a sum of money of his wife's chattels, which the *purchaser takes possession of*, was held to amount to a reduction into possession by the husband if reduction was necessary in such a case (*c*). As to a mere assignment, see case cited below (*d*).

Administration by Husband.—If a husband fail to reduce his wife's choses in action into possession during her lifetime, he will, upon her death before him, be entitled to them on taking out letters of administration to her. And this is the case with regard to the choses in action of a wife settled to her separate use, which she has not assigned during her life (*e*). If the husband die without having taken out administration, his personal representative, upon taking out letters of administration to the wife, will become entitled to such choses in action (*f*). If probate be granted of the wife's will, the executors will be merely trustees of the beneficial interest in her choses in action for her husband surviving her, and he, or if he is dead his legal personal representatives, may sue the executors in respect of them (*g*).

3. Chose in Action of a Married Woman—How far Assignable.

A husband can give no better right to another than he has himself; therefore all assignments made by the husband of the wife's choses in action, present or reversionary, vested or contingent, which are not, or cannot be, then reduced into possession, whether the assignment be in bankruptcy, or under the Insolvent Act, or to trustees for payment of debts, or to a purchaser for valuable consideration, even although the wife joins therein, pass only the

(*a*) *Heygate v. Annesley*, 3 Bro. Ch. 362; *Bourston v. Williams*, 3 Ch. 655; but see *Fleet v. Perrins*, 4 L.R.Q.B. 500.

(*b*) *Tidd v. Lister*, 3 De G. M. & G. 857.

(*c*) *Widgery v. Tepper*, 7 C. D. 423.

(*d*) See *Ellison v. Elwin*, p. 163, *infra*.

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(*e*) *Proudlev v. Fielder*, 2 My. & K. 87; *Re Lambert*, 39 C. D. 626.

(*f*) *Partington v. A.-G.*, L. R. 4 H. L. p. 100; *In the goods of Harding*, 2 P. & D. 394; *of Price*, 12 P. D. 137; *of Williams*, 67 L. T. 502.

(*g*) *Smart v. Tranter*, 43 C. D. 587.

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interest which the husband himself has, and are therefore subject to the wife's legal right by survivorship.

The result of the principal cases (*a*) may be stated shortly thus. The assignment, although by the husband and wife, puts the assignee in the same situation as the husband. If the chose in action is not reversionary, the claim of the assignee is liable to be defeated, either by the wife's equity to a settlement (*b*), or by her right of survivorship, until the chose is reduced into actual possession. If the chose is reversionary, and the wife survives her husband, she necessarily takes by survivorship, and the assignee takes nothing, but if the husband in such case survives the wife, the husband will become entitled on taking out administration (*c*), and through him his assignee.

In *Le Vasseur v. Scrutton* (*d*), a female infant being entitled to the reversion of a chose in action, expectant on the decease of the survivor of A. and B., she and her husband covenanted, in contemplation of their marriage, to assign it to trustees, in trust, as to one moiety for the husband absolutely, and as to the other moiety, for the wife and the issue of the marriage. The husband died first, and afterwards A. and B. died. It was held by *Shadwell*, V.-C., that the chose in action survived to the wife, and that she was entitled to have it transferred to her. In *Scrutton v. S.* (*e*), S. being eighteen years old, married in 1862. She was a ward of Court, but married without its sanction. An inquiry into her fortune was ordered and a settlement executed, whereby she settled a reversionary interest in personalty to which she was entitled under the will of a testator who died before Malm's Act came into operation, and this settlement was approved by the Court. She recognized the settlement by various acts, and applied to the P. D. and A. Division to vary it after a dissolution of her marriage had been decreed on her petition. Held, that no such acts, nor the sanction of the Court, nor the effect of Infants' Settlement Act, could bind her, and that she was entitled to a transfer of the property. In *Leuries v. D.* (*f*), a female infant settled two reversionary choses in

(*a*) See *Hornsby v. Lee*, *supra*; *Pardew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65; *Watson v. Dennis*, 3 Russ. 90; *Stunner v. Barker*, 5 Madd. 157; *Box v. B.*, 2 Con. & Law. 605; *Box v. Jackson*, 1 Drury, 55; *Greedy v. Lavender*, 13 B. 62; *Prole v. Soudy*, 3 Ch. 220; *Wilkinson v. Gibson*, 4 Eq. 162; *Widgery v. Tepper*,

7 C. D. 423; *Re Butler's T.*, 3 L. R. 1r. 89.

(*b*) See *Elibank v. Montolieu*, *post*.

(*c*) See (n.) "Administration by husband," p. 161.

(*d*) 14 Si. 116.

(*e*) (1858) 13 App. Cas. 61.

(*f*) 9 Eq. 468.

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action, she survived her husband, and then one of them fell into possession, which she directed to be paid to the trustees of the settlement. She was held to have confirmed the whole settlement so as to bind the second fund when it should fall in (a).

It is now clearly established that, whether the husband after an assignment of his wife's choses in action dies in the lifetime of the person having a prior interest, whereby the chose in action cannot, as against the wife, be reduced into possession, or whether he survives and dies before it is reduced into possession, the same result follows,—the chose in action will survive to the wife. Thus, in *Ellison v. Elwin* (b), by articles entered into on the marriage of a female infant, she and her intended husband agreed to assign, on her attaining twenty-one, a share of her deceased grandfather's residuary estate, to which she was entitled under the trusts of his will, to trustees, in trust for themselves and their children. After the lady had attained twenty-one a settlement was made for the purpose of carrying the articles into effect, to which the husband and wife and the trustees were the only parties; but before the settled property was transferred to the trustees the husband died. *Shadwell*, V.-C., held that the wife's right to the property by survivorship was not barred. The principle of this decision was followed by *Knight Bruce*, V.-C., in *Ashby v. A.* (c), in which case a husband, for a valuable consideration, assigned a legacy, to the payment of which his wife was entitled twelve months after the decease of the testator's widow. The husband survived the testator's widow more than twelve months, but took no steps to reduce the property into possession. His Honour held the assignment void as against the surviving wife (d). And a release by a husband of a reversionary chose in action of his wife is as inoperative to bind his wife by survivorship as his assignment would be (e), although the release by the husband of a chose in action payable *in presenti* is effectual to bar the wife's equity to a settlement (f).

Where an annuity or life interest in a fund is given to a married

(a) See also *Milner v. Harwood*, 18 V. 259, 277, and Addenda, Note A.

(b) 13 Si. 309. See note (d), p. 161.

(c) 1 Coll. Ch. R. 553.

(d) See also *Hastings v. Orde*, 11 Si. 205; *Wilkinson v. Charlesworth*, 10 B. 324, 328; *Rowland v. McDonnell*, 13 Ir. Ch. Rep. 365, 381; *Borton v.*

B., 16 Si. 552; *Michell v. Mudge*, 2 Gif. 183.

(e) *Rogers v. Acaster*, 14 B. 445.

(f) See *Lewin, Trusts*, 1891, p. 834, note d, citing *McCroory v. Searight*, 5 L. R. Ir. 206, 641; *Harrison v. Andrews*, 13 Si. 595.

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woman, and is not her separate property, the husband is not, with her concurrence, capable of effectually disposing of her life estate, except during his own life; for, if she outlive her husband, such part of it as would be enjoyed by her after the coverture determined would be reversionary only, and consequently the husband cannot make a title to such portion of the annuity or dividends of the fund as may accrue after his own death, and during the life of his wife surviving him (a).

Where personalty, a reversionary interest in which is given to a married woman, is brought into existence for the purpose of securing a loan to her husband, the assignment by the husband and wife with the object of effecting such security will, *pro tanto*, defeat the wife's right by survivorship. Thus, in *Wiater v. Kusum* (b), a married woman entitled to income for her separate use agreed to assist her husband in obtaining a loan from an insurance company. A policy was accordingly effected with the company, by which a sum was assured to the survivor of the husband and wife upon the death of the one first dying. By a mortgage deed of the same date, reciting an agreement for a loan by the office at the request of the husband and wife, the wife assigned her separate income, and the husband the policy by way of mortgage for securing the sum advanced by the company. By the same deed the husband and wife, the wife joining for the purpose of binding her separate estate, covenanted that the husband would pay the premiums on the policy; and there was a declaration by the husband alone that if he did not pay them the mortgagees might pay them out of income; and a declaration by all parties that if the policy moneys became payable before the mortgage was paid, the company might pay it out of those moneys. After the death of the husband the wife claimed the moneys payable under the policy as being a chose in action not settled to her separate use, and therefore incapable of being effectually assigned during the husband's life. It was held, C. A., that, although the policy if taken alone created an interest in the wife not capable of being assigned so as to bar her right by survivorship, yet as it had been created for the purpose of a mortgage, and as a part of the same transaction, and in pursuance of a contract that it should be a security to the company, the wife's interest was included in the security (c).

(a) *Stiff v. Everitt*, 1 My. & C. 37; *Becher*, 12 Si. 463.

Harley v. H., 10 Ha. 325; *Re* (b) 2 Do G. J. & S. 272.

Godfrey's T., 1 Ir. R. Eq. 531; *Purdew* (c) See also *Stamford, &c., Banking Co. v. Ball*, 31 L. J. (N. S.) Ch. 143.

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Where, however, a single woman insures her life, and afterwards marries, inasmuch as her contract with the insurance society is for a reversionary payment to herself, if the society with which she has insured assigns over its business to another society, it seems that the married woman cannot effectually adopt the liability of the latter society in lieu of that of the former (*a*).

It was finally determined in the case of *Whittle v. Henning* (*b*), after some conflicting decisions, that although a woman having a reversionary interest in personalty obtain an assignment of the interest of every other person therein, she will not thereby convert her reversionary interest into an interest in possession, or enable her husband to do indirectly what he could not do directly—assign her original interest, so as to bar her right by survivorship; and that if the reversionary fund is in Court, it will not be paid out, although the consent of all other persons interested in it be obtained.

But although a court of equity will not give effect to an assignment by the husband of his wife's reversionary chose in action, so as to defeat her legal right by survivorship, it will be good against him if he survive his wife (see the principal case). And when it becomes an interest *in possession* it will be subject to the wife's equity to a settlement (*c*).

Where reversionary personal estate to which two married women were absolutely entitled under a settlement prior to Malins' Act, was invested by the trustees in breach of trust in the purchase of land, it was held by the C. of A. that the interests of the married women could be disposed of by them by a duly acknowledged deed under 3 & 4 Will. 4, c. 74 (*d*). The point is, whether at the date of the deed executed by the married woman, the interest in question is an interest in land (*e*).

A married woman who has obtained a decree for a judicial separation from her husband is entitled absolutely, under 20 & 21 Vict. c. 85, s. 25, and 21 & 22 Vict. c. 108, s. 8, to her *chose in action* not reduced into possession, although she may have previously joined her husband in a mortgage thereof (*f*); and if the husband

(*a*) Conquest's case, 1 C. D. 334, 342.

(*b*) 2 Ph. 731, and see *Richards v. Chambers*, 10 V. 580; *Story v. Tongo*, 7 B. 91; *Brandon v. Woodthorpe*, 10 B. 463; *Cresswell v. Dowell*, 4 Gil. 460; *Re Butler's T.*, 3 Ir. R. Eq. 138.

(*c*) See *Greedy v. Lavender*, 13 B.

62; *Clarke v. Woodward*, 25 B. 455, and note to *Elibank v. Montolieu*, post.

(*d*) *Re Durrant*, 18 C. D. 106.

(*e*) *Miller v. Collins*, 40 Sol. Jo. 51; *Re Newton*, 23 C. D. 181, Addenda, Note B.

(*f*) *Re Insole*, 1 Eq. 470.

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appears to oppose the application of his wife, he will be refused costs (*a*). And see the Summary Jurisdiction (M. W.) Act, 1895, s. 5.

The same result follows when there has been a decree for the dissolution of marriage, for after the dissolution there is no right in the husband, whose right to reduce into possession only exists during the coverture (*b*). The order "*nisi*" is the decree which the Court eventually makes absolute, and the order absolute relates back to the decree "*nisi*," and renders any act done in the interval inoperative. Anything so done, therefore, by the husband or his assignee will not have the effect of reducing the wife's *choses in action* into possession (*c*); and although the wife, after a decree for the dissolution of the marriage, does not obtain possession of her "*choses in action*," her executors will be entitled thereto, and not the husband (*d*). So a married woman who has obtained a protection order under 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 8; 41 Vict. c. 19, s. 4, in consequence of her husband's desertion, will become absolutely entitled to her *choses in action* not reduced into possession (*e*).

If the chose in action either is originally, or becomes, an interest presently attainable, it may be reduced into possession by actual payment to the husband or his assignees; and the wife's right by survivorship and her equity to a settlement *may*, unless she has taken steps to insist upon it (*f*), be thereby defeated (*g*).

Joint Tenancy.—The effect of marriage on property in which a woman has an interest as joint tenant depends upon whether the marriage divests the property in the wife and vests it in the husband. If it does, then the joint tenancy is severed. But where some *nexus actus interveniens* on the part of the husband is required, *i.e.*, an assignment of the wife's chattels real, or the reduc-

(*a*) *Johnson v. Lauder*, 7 Eq. 228.

(*b*) *Wells v. Malbon*, 31 B. 48; *Prole v. Soudy*, 3 Ch. 220; *Heath v. Lewis*, 4 Gif. 665; *Swift v. Womman*, 10 Eq. 15; *Seaton v. Seaton*, 13 App. Cas. 61, *supra*, p. 162; *Jessop v. Blake*, 3 Gif. 639; *Fitzgerald v. Chapman*, 1 C. D. 563.

(*c*) *Prole v. Soudy*, 3 Ch. 220; explained in *Norman v. Villars*, 2 Ex.

D. 359.

(*d*) *Wilkinson v. Gibson*, 4 Eq. 162.

(*e*) *Re Coward, &c.*, 20 Eq. 179; *Nicholson v. Drury, &c., Co.*, 7 C. D. 48; *Re Emery's T.*, 32 W. R. 357; *Ewart v. Chubb*, 20 Eq. 454.

(*f*) *Greedy v. Lavender*, 13 B. 62.

(*g*) *Cunningham v. Antrobus*, 16 Si. 436; *Alday v. Fletcher*, 1 De G. & J. 82.

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tion into possession of her choses in action, in neither of these cases does marriage act as a severance. If, therefore, in such cases the wife dies before the husband has assigned the chattel real or reduced the chose in action into possession, the other joint tenants will take by survivorship (*a*).

Stop Order.—As to the form of the stop order on the assignment of a wife's reversionary chose in action see cases cited below (*b*).

Domicil.—Where a married woman, domiciled abroad, is entitled to reversionary interests in personalty, her rights or powers over such interests, or those of her husband, will be regulated by the law of their domicil (*c*).

20 & 21 Vict. c. 57 (Malins' Act).—This Act enables married women, in certain cases, to dispose of reversionary interests in personal estate in the same manner as they can now dispose of their real estates.

S. 1, "After the 31st day of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st day of December, 1857 (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: *Provided always*, that nothing herein contained shall extend to any rever-

(*a*) See judgment of *Bowen, L.J.*, in *Re Butler's T.*, 38 C. D. 286; *Baillie v. Treherne*, 17 C. D. 388, disapproved; *Re Barton's Will*, 10 Ha. 12.

(*b*) *Moreau v. Polley*, 1 De G. & Sm. 143; and R. S. C. (1883), O. 46, rr. 12, 13; Annual Practice, 1896, p. 866.

(*c*) *Guepratte v. Young*, 4 De G. & S. 217; *Duncan v. Cannon*, 18 B. 128.

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sionary interest to which she shall become entitled by virtue of any deed, will, or instrument by which she shall be restrained from alienating or affecting the same."

"In any personal estate" (a).—These words include a life assurance effected by a woman before her marriage (b).

"Any instrument made after," &c.—Where a married woman takes a reversionary interest under an appointment executed after the 31st day of December, 1857, and made in pursuance of a power contained in an instrument dated before that day, she will not, under this Act, be able to dispose of such reversionary interest as if she had become entitled to it under an instrument made after the 31st day of December, 1857 (c).

Effect of assignment hereunder.—An assignment, when duly made under this statute, passes and transfers personal property to which a married woman is entitled in reversion, discharged from the right of her husband, or anyone claiming under him, although he concurs in the assignment, as effectually as if she were a feme sole. In *Re Butcher* (d), a married woman, whose husband was indebted to a testator, having become entitled under his will to a legacy in reversion, not limited to her separate use, joined with her husband in assigning it for value by deed duly executed and acknowledged by her under this Act. On the reversion falling in, the executors claimed to be entitled to retain the amount of the debt out of the legacy. *Selborne*, C., held that there was no right of retainer, and that the assignee for value was entitled to be paid in full.

S. 2. "Every deed to be executed in" *England or Wales* (e) by a married woman for any of the purposes of this Act shall be acknowledged by her, in the manner prescribed by 3 & 4 Will. 4, c. 74 (f); and every deed to be executed in *Ireland* by a married woman for any of the purposes of this Act shall be acknowledged by her in the manner prescribed by 4 & 5 Will. 4,

(a) See as to these words *Witherby v. Rackham*, 39 W. R. 363; *Re Newton*, 23 C. D. 181; *Re Algeo*, Ir. Rep. 2 Eq. 485.

(b) *Ibid.*

(c) *Re Butler's T.*, 3 Ir. R. Eq. 138; cf. *Re Elcom*, (1894) 1 Ch. 303; *Re*

Bennett, 99 L. T. Jo. 112.

(d) 16 Eq. 48. Cf. *Re Jakeman*, 23 C. D. 344; *Re Briant*, 39 C. D., p. 478.

(e) The Act does not extend to Scotland (s. 4).

(f) The Fines and Recoveries Act.

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c. 92 (a) ; and all and singular the clauses and provisions in the said Acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said Acts mentioned, shall extend and be applicable to such interests in personal estate and to such powers as may be disposed of, released, or extinguished by virtue of this Act, as fully and effectually as if such interests or powers were interests in or powers over land.

"Shall be acknowledged."—See as to the effect of an acknowledgment and separate examination under the Fines and Recoveries Act cases cited below (b). In *Roberts v. Cooper* (c), a wife acknowledged a deed hereunder although the reversionary interests were derived under wills made before the 31 December, 1857. But the Court took this, and other conduct, into consideration in deciding as to her equity to a settlement.

S. 3. "Provided always that the powers of disposition given to a married woman by this Act shall not interfere with any power which independently of this Act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition."

S. 4. "Provided always that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage."

A wife's resulting interest in her reversion remaining undisposed of by an agreement made in contemplation of her marriage, for the settlement of her property, falls within the proviso of this section and her contingent reversionary interest under the agreement was held not to be a resulting trust, but to be an interest which accrued under the settlement (d).

S. 5. "This Act shall not extend to Scotland."

(a) The Irish Fines and Recoveries Act. v. Willens, 23 L. R. Ir. 436.

(b) Tennent v. Welch, 37 C. D. 622. (c) (1891) 2 Ch. 335.

And cf. *Re Rogers*, L. R. 1 C. P. 47; (d) *Clarke v. Green*, 2 Hem. & M.

Ex p. Cockerell, 4 C. P. D. 39; *Druitt* 474.

BOUNDARIES AND PARTITION.

WAKE *v.* CONYERS.

1759. 1 Eden, 331 (a).

Boundaries.

All cases where the Court has entertained bills for establishing boundaries, have been where the soil itself was in question, or there might have been a multiplicity of suits.

The Court has no power as of course to issue commissions to fix the boundaries of legal estates. Some equity must be superinduced by the acts of the parties, as some particular circumstances of fraud ; or confusion, where one party has ploughed too near the other, or the like.

Bill to ascertain the boundaries of two manors dismissed, there being no dispute as to the soil.

THE defendants, John Conyers, Esq., as tenant for life, his wife Lady Henrietta, as entitled after his death to her jointure, and his son, an infant, as tenant in tail, were entitled to the manor of Epping, and also to the freehold of certain lands next adjoining to it, lying in the manor of Waltham ; the boundary lines of the two manors passing through Mr. Conyers' park. He had cut down certain trees which, it was alleged by the bill, were standing on the line, and were boundary marks.

The present bill was filed by Sir William Wake, as prochein amy to his three infant sons, who were tenants in tail successively of the manor of Waltham, praying that the boundary of the manor of Waltham, so far as the same abuts on the manor of Epping, might be fixed and set out, and that a commission might issue for that purpose ; and that the defendant John Conyers might set up new boundary marks in the room of those which he had cut down and destroyed.

Mr. Conyers by his answer admitted the cutting down of certain

(a) 2 Cox, 360, Hill's MSS.

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trees, but denied that they were boundary marks; though he submitted to have the boundaries ascertained and settled, and that marks might be set up to perpetuate such boundaries.

On the opening, the Lord Keeper (*Henley*) objected to the nature of the suit, as being merely to settle the boundaries of the manor. He said he did not think the Court had jurisdiction, and desired it to stand over, for counsel to consider whether there was sufficient equity for the Court to entertain the bill.

It came on again this day (a).

The *Attorney-General* (Sir *Charles Pratt*), *Wilbraham*, and *Browning*, for the plaintiffs, cited the authorities and cases mentioned below (b).

Perrot and *Hoskins*, for the defendants.—This bill, under pretence of establishing boundaries, is, in fact, to settle manorial rights. It is said, that every question for the settling of boundaries is a proper subject for the jurisdiction of this Court. That is, however, not the case. Those cases which have been cited, in which a man, having joint occupation, has confounded the boundaries, have turned upon the fraud which has been relieved against. A similar principle has given the Court jurisdiction in the cases of rent-charge.

LORD KEEPER HENLEY (c).—This bill is merely for ascertaining the boundaries of these two manors, and is intended to bind the inheritance of the parties for ever. It struck me as new, upon the opening. I have been, ever since I sat here, extremely jealous of the jurisdiction of this Court over legal inheritances. I was, therefore, desirous that some precedent should be produced, to show me that this Court could entertain a bill of this nature, to settle the boundaries of an incorporeal inheritance; but none such has been produced. There have, since I sat here, been several [Bills] to fix boundaries where a right to the freehold of the soil has been incidental. But I

(a) June 16, 1759.

(b) *Tothill*, 84, 126, 127, 210; *Bowman v. Yeat*, 1 Ch. Ca. 146; *Harding v. Countess of Suffolk*, 1 Ch. Rep. 63; *Cocks v. Foley*, 1 Vern. 359; *The Duke*

of *Dorset v. Serjeant Girdler*, Pr. Ch. 531.

(c) Afterwards Lord Chancellor and Earl of Northington.

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have seen such frightful consequences arising from them, that I think these suits are very far from deserving encouragement. They originally came into this Court under the equity of preventing multiplicity of suits; yet in those cases I have observed that they have been sometimes attended with more expense than if all the suits which they apprehended, and which they were brought to prevent, had actually been tried at law.

Hitherto these disputes have been only between persons of great fortune. But the consequences have been that the parties have been eager to come into this Court, without any attention being paid to see whether the prayer of the bill applies properly to the jurisdiction. An issue is directed, and after going down to the Assizes, at a very great expense, and a verdict being found for one party, the other is dissatisfied, and a new trial is directed. I was extremely unwilling to grant the last new trial, in the case of *The Earl of Darlington v. Bours (a)*, but on inquiring of the bar whether there was any instance of a decree made upon one verdict only, none could be produced; and if there were any, they were so few, that they could not be remembered. I therefore thought myself bound by the current of opinions to grant it. But I am determined, if any such case should ever come before me again, to consider it in a different light, and to have the matter more fully inquired into, and prevent, if possible, an expense which is a reproach to the law.

All the cases where the Court has entertained bills for establishing boundaries, have been where the soil itself was in question, or where there might have been a multiplicity of suits.

The Court has, in my opinion (and if parties are not satisfied, they have resort elsewhere), no power to fix the boundaries of *legal* estates, *unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud, or coercion, where one party has ploughed too near the other, or the like; nor has this Court a power to issue such commissions of course, as here prayed.*

In this case, it is said there is no legal remedy, and therefore there must be an equitable one; but this does not follow unless there is an equitable right. If there is a legal right, there must be a legal remedy; and if there is no legal right, there can, in this case, be no equitable one.

(a) 1 Eden, 270.

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It is said, that, in some future time, there may be a casual right such as escheat, treasure trove, &c. ; but am I to countenance such a suit as this before there is any such right, merely because it may happen, though when it does happen, it may perhaps be such a right as the parties will not think it worth their while to contend for ?

If I were to make this a precedent, it would be, in effect to issue commissions to settle boundaries all over the kingdom ; for if of manors, why not of honours, of hundreds, and all other inferior denominations of districts ? I shall always, while I have the honour to sit here, be very attentive to prevent the subject from great waste of expense about matters by no means adequate to it. Should I entertain such a bill as this, I should put it in the power of every opulent lord of a manor to distress, if not ruin, not only a poor man, but even a man of moderate fortune, whose estate happens to border upon his ; for these suits are often attended with 2,000*l.* or 3,000*l.* expense—a dishonour to justice.

In order to give this Court jurisdiction, there must appear some equitable circumstances in the case. I know of no boundary marks to a manor in another's soil. The trees were Mr. Conyers' own : he had a right to cut them down ; and if the plaintiffs are afraid of losing, in the course of time, the evidence of the boundaries of their manors, they may preserve it by perambulations as often as they please ; but I cannot fix the limits of a legal right (if any), unless the jurisdiction of this Court is superinduced by some equitable circumstances, which it is not in this case.

Another consideration is, that the plaintiffs are infants, and so is one of the defendants ; and shall I send the infant plaintiffs beforehand, when they know not the value of their estate to bind the inheritance *quia timent*, under the protection of the father, who is not privy in estate to them ? I am well satisfied that this bill ought to be dismissed.

NOTES.**1. Generally.**

2. Cases in which a commission has been issued, or an issue directed, p. 175

1. Generally.

The jurisdiction of the Court to issue a commission to ascertain

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boundaries is very ancient (*a*), but its origin is by no means free from doubt.

The Lord Keeper, in the principal case, was of opinion, that suits to determine boundaries originally came into the Court of Chancery under the equity of preventing multiplicity of suits; but *Grant*, M.R., in a case where it became necessary to inquire by what principles the Court is guided in granting a commission of this description, observes, that "there are two writs in the register (*b*), concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of this jurisdiction by the Court of Chancery took its commencement. The first is the writ *de rationalibus divisis* (*c*); the other, the writ *de perambulatione faciendâ* (*d*). Both Lord *Northington* and Lord *Thurlow*, without referring to this writ or commission as the origin of the jurisdiction of the Court, have yet expressed an opinion, that *consent* was the ground on which it had been at first exercised. The next step would probably be, to grant the commission on the application of one party who showed an *equitable* ground for obtaining it; such as, that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And to its exercise on such an equitable ground, no objection has ever been made" (*e*).

Doubtful, however, as the origin of the jurisdiction may be, it is certain that it has been viewed with extreme jealousy by modern equity judges, who have always been desirous that the rights of parties should, when practicable, be tried and determined in the ordinary legal mode. And although formerly a wider jurisdiction may have been exercised, the rule now acted upon is that laid down by the Lord Keeper in the principal case, "*that the Court has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties*" (*f*).

In the principal case the Lord Keeper refused to issue a commission to ascertain the boundaries of two adjacent manors, inasmuch as the soil itself was not in question, and his decision was followed by

(*a*) *Mullineux v. M.*, *Peckering v. Kempton*, Toth. 39; *Spyer v. S. Nels.* 14; *Boteler v. Spelman*, Rep. t. Finch, 96; *Wintle v. Carpenter*, Ibid. 462; *Glynn v. Scawen*, Ibid. 239.

(*b*) Since abolished: see 3 & 4 Will. 4, c. 27, s. 36.

(*c*) Reg. Brev. 157 b.

(*d*) Reg. Brev. Ib.

(*e*) *Speer v. Crawter*, 2 Mer. 416 and see Story, Eq. Jur. (1892) p. 402.

(*f*) See p. 173, supra, and *Speer v. Crawter*, 2 Mer. 418; *O'Hara v. Strange*, 11 Ir. Eq. Rep. 262; *Ireland v. Wilson*, 1 Ir. Ch. Rep. 623.

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Grant, M.R., in *Speer v. Crowter*. So likewise the Court has refused to entertain a bill filed by the rector of a parish for an account of tithes, and to have a commission to settle the boundaries of the parish and the glebe (*a*); and also a bill filed by a parish to avoid confusion in making their rates, and praying a commission to fix their boundaries for that purpose (*b*).

Where, moreover, a party has allowed boundaries to fall into confusion, he cannot ask for a commission against another who was not shown to have obtained possession improperly. In *Miller v. Warmington* (*c*), a termor having, by himself or his under-tenants, suffered the boundaries between the demised premises and contiguous lands of his own to become confused, he was held not entitled after the expiration of the term to a commission to ascertain them in opposition to the assignee of the lessor, who then, and had since, continued in the possession of both, it not being shown that such possession was improperly obtained.

The jurisdiction vested in the High Court of Chancery has been transferred to the High Court of Justice by the 16th sect. of the Judicature Act, 1873, and all the Judges of the High Court have now the same jurisdiction (*d*). The jurisdiction therefore still exists, and the practice will probably be moulded to meet the requirements of modern times, and the alterations in modern procedure (*e*).

2. Cases in which a Commission has been issued, or an issue directed.

If the confusion of boundaries has been occasioned, not by the negligence of both, but by the *fraud* of one of the parties where, for instance, he has been gradually encroaching, by ploughing or digging too near to the other, with the intention of obliterating the boundaries, a Court of equity has interfered (*f*).

Where such a relation exists between two parties, as that of tenant and landlord, which makes it the duty of the tenant to preserve the boundaries, if he permits them to be destroyed, so that the landlord's land

(*a*) *Atkins v. Hatton*, 2 *Anst.* 386.

(*b*) *St. Luke's v. St. Leonard's*, 2 *Anst.* 395, cited 2 *Dick.* 350, *nom.* *Waring v. Hotham*.

(*c*) 1 *J. & W.* 484.

(*d*) See the Annual Practice, Part I.

(*e*) Cf. *Lascelles v. Butt*, 2 *C. D.* 593; Arbitration Act, 1889, ss. 13 &

14; *Spike v. Harding*, 7 *C. D.* 871;

Searle v. Cook, 43 *C. D.* 519; and *Seton* (1893), p. 1571.

(*f*) *Wintle v. Carpenter*, *Rep. t. Finch*, 462; *Bute v. Glamorganshire, &c., Co.*, 1 *Ph.* 681; *Rouse v. Barker*, 4 *Bro. P. C.* 660, *Toml. edit.*; *Atkins v. Hatton*, *Anst.* 396.

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cannot be distinguished from his, and restored specifically, he will, even in the absence of fraud on his part, be compelled to substitute land of equal value, the land or its value being ascertained by commission. "It has been long settled," observes Lord *Eldon*, "and that law is not now to be unhinged, that a tenant contracts, among other obligations resulting from that relation, to keep distinct from his own property, during his tenancy and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own. This is, therefore, a common equity, that a tenant, having put his landlord's property and his own together, for his own convenience, in order to make the most of it during his tenancy, is bound, at the end of the term, to render up specifically the landlord's land, and if he cannot, that a commission shall issue from a Court of equity, to inquire what were the lands of the landlord, the Court taking care, to the intent that the tenant may discharge his obligation to do what is right as to the possession in the meantime; and if the tenant has so confounded the boundaries, sub-dividing the land by hedges and stones, and destroying the metes and bounds, so that the landlord's land cannot be ascertained, the Court will inquire what was the value of the landlord's estate, valued fairly, but to the utmost, as against that tenant, who has himself destroyed the possibility of the landlord's having his own (a).

The Court, moreover, has jurisdiction to ascertain the boundary *during the term* if the tenant has confused the lands demised with lands of his own, for it is clearly his duty, not merely to leave the boundary between his own land and his landlord's distinct at the expiration of the term, but also to keep it distinct during the term (b).

And it seems that the same result would follow, if the confusion of the boundaries was occasioned by a tenant for life (c); or where confusion of the boundaries of manors was occasioned by the acts or neglect of a tenant or lessee of one of the manors being the owner of the other (d).

So, where several lands allotted to the holders of certain offices,

(a) *A.-G. v. Fullerton*, 2 V. & B. 264; and see *Glynn v. Scawon*, Rep. t. Finch, 239; *Wintle v. Carpenter*, 1b. 462; *Aston v. Exeter*, 6 V. 293; *Leeds v. Strafford*, 4 V. 180; *Grierson v. Eyre*, 9 V. 345; *Willis v. Parkinson*, 2 Mer. 507; *Godfrey v. Littel*, 1

Russ. & M. 59, 2 *Russ. & M.* 630; *Brown v. Wales*, 15 Eq. 142.

(b) *Spike v. Harding*, 7 C. D. 871.

(c) *A.-G. v. Stephens*, 6 De G. M. & G. 133.

(d) See *Speer v. Cawter*, 2 Mer. 415, 418; *Clayton v. Cookes*, 2 Atk. 449.

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were for a long series of years in the possession of a single individual, in consequence of his holding all the offices, a confusion of boundaries taking place in consequence thereof seems to have been considered to be a good ground for proceedings in equity, though it was not necessary to determine the point (a).

And it seems where a confusion of lands was occasioned by a deviser, if they came into the hands of parties whose duty it was to ascertain the boundaries, a person entitled to part of such lands might come into equity to establish his claim. Thus in *Hicks v. Hastings* (b), a testatrix by her will appointed the manor of Watton (over which she had an equitable power of appointment) to uses, under which the plaintiff became entitled as tenant in tail in possession, and devised her residuary real estate to trustees upon trust to sell. The trustees sold (amongst other things) a field, part of which was shown by the abstract to be parcel of the manor and procured the legal estate in the whole to be conveyed to the purchaser. It was held by *Page Wood*, V.-C., that, notwithstanding the fault of the confusion lay with the party through whom the plaintiff claimed, the plaintiff was not precluded from establishing in the Court a claim to a portion of the land and to a proportional part of the rents from the time when he became of age. And an inquiry was directed, in what part of the field the plaintiff's portion was situated (c).

So relief would be granted not only against a party guilty of neglect or fraud in causing a confusion of boundaries, but also against all those who claimed under him, either as volunteers or purchasers, with notice (d).

The Court, in cases relating to confusion of boundaries, proceeds upon the same principle as it does where an agent or bailee, or any other person in a fiduciary position, mixes the trust property with his own, that is, the *cestui que trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own (e).

The plaintiff must show (1) some grounds of equitable relief; see *supra*, p. 173; (2) that some portion of the lands, the boundaries of

(a) *Kennedy v. Trott*, 6 Moo. P. C. C. 467.

(b) 3 Kay & J. 701.

(c) And see *Clarke v. Yonge*, 5 B. 523.

(d) *A.-G. v. Stephens*, 6 De G. M. & W. & T.—VOL. I.

G. 134; *Hicks v. Hastings*, 3 Kay & J. 701; *Brown v. Wales*, 15 Eq. 141.

(e) *Lupton v. White*, 15 V. 432; *Panton v. P.*, cited 8 V. 440; *Chedworth v. Edwards*, 8 V. 46; *Cook v. Addison*, 7 Eq. 466; *Lewin*, 1891, p. 317.

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which are alleged to have been confused, is in the possession of the defendant (*a*); (3) a clear title to some land in the possession of the defendant (*b*); (4) that without the aid of the Court the boundaries cannot be found (*c*).

In cases, however, where boundaries have become confused or lost by the acts of the parties, the action will generally take the form of a claim for a declaration of right and an injunction against trespass (*d*).

Although hearsay evidence is admissible on the question of parochial or manorial boundaries, it is not so as to the boundaries between two private proprietors (*e*). Nor is a tithe-map admissible in evidence as showing boundaries in case of a disputed title (*f*). As to the evidence afforded by entries in parish books and receipts for rent, see the case cited below (*g*).

Where the quantity of land in the possession of the plaintiff is doubtful, the Court will direct an inquiry (*h*), or a commission or issue (*i*).

Another and a very old ground for equity interposing in cases of this kind, which is mentioned in the principal case, was to prevent multiplicity of suits (*l*). In the case of the *Marquis of Bute v. The Glamorganshire Canal Company* (*l*), a commission to ascertain boundaries was prayed for, and the bill, amongst other things, alleged that the defendants had gradually encroached upon the plaintiff's land, filling up the ditch or the greater part of it, and obliterating the boundary, and that the occupiers were fifty in number, and that it would be impracticable to proceed at law.

The Courts have jurisdiction to issue a commission to ascertain boundaries in our colonies (*m*).

References.—A reference to Chambers may now be directed in lieu of the issue of a commission, further consideration being adjourned

(*a*) *A.-G. v. Stephens*, 6 De G. M. & G. 121.

(*b*) *Ibid.*

(*c*) *Miller v. Warmington*, 1 J. & W. 491.

(*d*) Cf. *Marshall v. Taylor*, (1895) 1 Ch. 641.

(*e*) *Nicholls v. Parker*, 14 East, 331 (n.); *Clothier v. Chapman*, *Ib.*; cf. *Wills on Evidence*, pp. 41, 172, 174.

(*f*) *Wilberforce v. Hearfield*, 3 C. D. 709; *Wills on Evidence*, p. 310.

(*g*) *A.-G. v. Stephens*, 1 Kay & J. 724.

(*h*) *Hicks v. Hastings*, 3 Kay & J. 701.

(*i*) *Godfrey v. Littel*, 2 Russ. & M. 630.

(*k*) See *Bouverie v. Prentice*, 1 Bro. Ch. 200; *Mayor, &c. v. Pilkington*, 1 Atk. 282, 281; and see *Whaley v. Dawson*, 2 Sch. & L. 370, 371; *The Commissioners, &c. v. Glasse*, 41 L. J. Ch. N. S. 409.

(*l*) 1 Ph. 681.

(*m*) *Tulloch v. Hartley*, 1 Y. & C. C. 114; *Paget v. Ede*, 18 Eq. 118; *Penn v. Baltimore*, post.

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and costs reserved (*a*). or, *scabbe* a reference under the 13th. or 14th sects. of the Arbitration Act, 1889; or an issue (*b*).

Forms of Commissions.—In the Forms of Commissions for ascertaining Boundaries it will be seen (*c*) that all proper consequential directions for compensation, apportionment, and accounts of rents and timber cut will be made. For a commission to set out the boundaries of two collieries, and the several closes and parcels of land thereto belonging, see *Collingwood v. Dawson* (*d*). For a decree to ascertain charity lands see cases cited below (*e*). For an order of reference to an engineer, to make a plan of the medium line of high-water of the seashore in question, such plan to be deposited with the Clerk of Records, &c., to be inspected by the parties, see *A.-G. v. Chambers* (*f*).

Corporations.—As to authorising the identifying of land and other possessions of ecclesiastical and collegiate corporations, see 2 & 3 Will. 4, c. 80.

Costs.—The costs of a commission for settling boundaries and separating freeholds and copyholds were ordered to be borne by the parties equally, though the interests were not equal, in *Norris v. Le Neve* (*h*). But in *Haberkham v. Stansfield* (*i*), the costs of all parties were directed to be paid out of the testator's estate, rateably in the proportion of the value of the freeholds to the copyholds.

Right to Distrain lost by Confusion of Boundaries, &c.—A somewhat similar class of cases may be here mentioned, in which the owner of a rent will be entitled to relief in equity, "on the usage of payment," where, in consequence of the confusion of boundaries or otherwise, the particular lands on which the rent is a charge, cannot be fixed on, as a fund for the legal remedy by distress (*h*).

(*a*) *Spike v. Harding*, 7 C. D. 871.

(*b*) *Godfrey v. Littel*, 1 Russ. & M. 59, 2 Ib. 630; R. S. C., 1883, O. 33, r. 1; O. 36, r. 5, Annual Practice, Part II.

(*c*) See Seton (1893), p. 1571.

(*d*) See Seton, p. 1573.

(*e*) See *A.-G. v. Bowyer*, 5 V. 300; *A.-G. v. Fullarton*, 2 V. & B. 263; *Reresby v. Farrer*, 2 Vern. 111; *Norris v. Le Neve*, 3 Atk. 32; *A.-G. v. Wax*

Chandlers Co., L. R. 6 H. L. 14; Seton (1893), p. 1573.

(*f*) 4 De G. & J. 58.

(*h*) 3 Atk. 32.

(*i*) Seton (1893), p. 1573.

(*k*) See *Leeds v. Powell*, 1 V. 171, 172; *North v. Strafford*, 3 P. W. 148; *Bouverie v. Prentice*, 1 Bro. Ch. 200; *Leeds v. Corp. New Radnor*, 2 Bro. Ch. 518; *Mayor of Basingstoke v. Bolton*, 1 Drew. 289.

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But the Court will not grant relief unless the plaintiff can fix upon some house or parcel of land and say that it was part of the land sought to be charged; nor will it interfere in the case of heriots payable by custom out of the chattels of a deceased tenant by his executor, or against his heir, in the absence of his personal representatives (*a*).

Inclosure Acts.—Under the Inclosure Acts, 1845, 1876, the Board of Agriculture (*b*) has power, when lands are inconveniently mixed, to confirm an agreement for division made by the parties interested, and to counterchange the titles of parcels allotted on the division, and with the consent of the lord in the case of copyhold lands, to appoint an assistant commissioner to make a redivision of intermixed lands (*c*).

Copyholds.—The Copyhold Act, 1894, s. 52, provides for the settlement of boundaries on an enfranchisement under that Act (*d*).

Charities.—Where charity lands have been occupied with other lands and the tenant cannot ascertain what part of the lands belong to the charity, the Court of Chancery has frequently issued commissions to ascertain what belongs to the charity and what does not (*e*). As to the power of the Board of Charity Commissioners to ascertain lands charged with a rent for the benefit of a charity, not exceeding 10*l.* (*f*).

(*a*) *Mayor of Basingstoke v. Bolton*,
supra.

(*b*) See the Board of Agriculture
Act, 1889; Chitty's Statutes (Lely,
1894), "Agriculture."

(*c*) See 8 & 9 Vict. c. 118; 9 & 10

Vict. c. 70; 39 & 40 Vict. c. 56.

(*d*) The Copyhold Act, 1894 (57 & 58
Vict. c. 46); Shelford, R. P. Stat.
(1893), p. 41.

(*e*) See cases cited note (*k*), p. 170.

(*f*) See 18 & 19 Vict. c. 124, s. 33.

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AGAR *v.* HOLDSWORTH.

1808—1811. 17 V. 533.

Partition.

Decree for partition among several joint proprietors ; and no objection from a covenant not to inclose without general consent, rights of common, and the inequality and uncertainty of the shares in proportion to other estates. Form of decree.

THE bill stated that Lord Fairfax and other persons were, in 1716, seised in fee of the manor of Bilbrough, in the county of the city of York, and of the greatest part of the lands in the said manor, and also of the whole of the piece of land in the said manor called Bilbrough Moor, then uninclosed ; and by indentures of bargain and sale and release, dated the 14th of July, 1716, Lord Fairfax and the other persons so seised sold and conveyed all the said manors, lands, and Bilbrough Moor and other estates in the county of the city of York, to the use of Robert Fairfax and John Hardwicke and their heirs.

By indentures of lease and release, dated the 7th and 8th of September, 1716, reciting that part of the purchase-money paid for the premises, conveyed by the former deeds, was advanced to Robert Fairfax by Thomas March, under an agreement whereby he was to become the sole purchaser of the lands and hereditaments therein mentioned, Fairfax and Hardwicke conveyed to Thomas March and Arthur March the several lands, particularly described, situate in Bilbrough, and also all the said Thomas March's part and share of and in the moor or common called Bilbrough Moor, and of and in the soil, freehold, and inheritance of the same ; which part or share, it was thereby declared, Thomas March had purchased of Robert Fairfax, together with the farms and lands thereby granted and released ; and that the said moor was to be estimated and allotted between the said

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Robert Fairfax and the said Thomas March, and the other purchasers under Robert Fairfax and John Hardwicke; viz., Charles Redman, Bernard Banks, Matthew Smith, and Nathaniel Hird, in proportion to the several farms and lands in Bilbrough aforesaid by them respectively purchased, and the valuation of the same, whenever the said moor or common called Bilbrough Moor should happen to be inclosed in time to come; but reserving to Fairfax and Hardwicke, their heirs and assigns, all the back lanes and the High Street, and a small waste thereupon in Bilbrough aforesaid, with liberty to them to inclose the same, subject, nevertheless (both before and after such inclosure), to such ways, &c., in and through the same, to be made by the said Thomas March, his heirs and assigns, as had been anciently and customarily used and enjoyed by the tenants, owners, or occupiers of the farms, lands, and premises thereby released to March and his heirs; to hold to Thomas and Arthur March, their heirs and assigns for ever.

The bill further stated that Redman, Banks, Smith, and Hird, respectively, purchased under Fairfax and Hardwicke divers farms and lands in Bilbrough, and also several parts or shares of Bilbrough Moor, and of and in the soil, freehold, and inheritance thereof, in proportion to the several farms and lands in Bilbrough aforesaid by them respectively purchased, and what should be the value thereof respectively, when the said piece of land called Bilbrough Moor should be divided or inclosed, in the same manner as the share of Thomas March in the said moor was to be estimated and allotted; and the said messuages, farms, lands, and premises, and the said parts or shares of Bilbrough Moor, were conveyed to Redman, Banks, Smith, and Hird, and their respective heirs and assigns, in fee simple; and Fairfax and Hardwicke retained the remaining part of the said lands in Bilbrough, and a part or share of Bilbrough Moor, and of and in the freehold and inheritance thereof, in proportion to the farms and lands in Bilbrough aforesaid retained by them, and what should be the value thereof at the time when the said piece of land called Bilbrough Moor should be divided or inclosed, in the same manner as the share of the said Thomas March in Bilbrough Moor was to be estimated and allotted.

Arthur March, who was a trustee for Thomas March, died in his lifetime; and Robert Fairfax died in the lifetime of Hardwicke; and

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by divers mesue conveyances, &c., the whole of the said premises, conveyed to Fairfax and Hardwicke, and Bilbrough Moor, became vested in the plaintiff, and such of the defendants to the original bill as therein named, in the manner, shares, and proportions therein stated : and they, and no other person, were seised in fee of the whole of Bilbrough Moor, and the freehold and inheritance thereof, as tenants in common, which had been used and enjoyed by them, and those under whom they derive title, as common pasture, for horses, &c.

The bill prayed an account of the lands in Bilbrough, conveyed to Thomas and Arthur March, and those purchased by Redman and the other persons from Fairfax and Hardwicke, and of the lands retained by them : that the value of the said lands might be ascertained ; and that a commission might be directed to issue, to ascertain the value of the said several lands, and the parts or shares of the plaintiff and the persons other named in Bilbrough Moor ; and also to allot in severalty, make partition of, and divide Bilbrough Moor into six several parts or shares, in proportion to the amount of the true and just value of the several farms and lands in Bilbrough, so conveyed and purchased or retained ; and that all the said shares of Bilbrough Moor, when so allotted, might be inclosed and held in severalty by the plaintiff and the other persons entitled, &c.

The answer stated, that in each of the derivative conveyances to the joint or sub-purchasers under Fairfax, are contained covenants against inclosures of the moor without consent : viz., covenants by Robert Fairfax and John Hardwicke respectively, with each of the sub-purchasers, that neither he nor his heirs and assigns should or would inclose, or cause to be inclosed, any part of the said moor, other than the back lanes and small waste, as therein mentioned, without the consent of the said Thomas March, &c., his heirs or assigns ; and Thomas March and the other sub-purchasers entered into similar covenants with Fairfax and Hardwicke not to inclose without the consent of them and their heirs. The answers also stated the persons in whom the estates so conveyed to Fairfax and Hardwicke were vested ; and that those persons and their tenants not exclusively, but together with others, had enjoyed and exercised the herbage and other rights and privileges in and upon Bilbrough Moor ; and that the several rights, shares, and interests of the persons entitled were uncertain, and in no wise ascertained : and the defendants submitted, that such partition as was sought by the bill ought

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not now to take place ; particularly as such rights and interests, and the other rights and interests in and to the said moor, were uncertain and indeterminate, and the parties concerned were not agreed, and had not consented to having an inclosure or partition thereof ; and submitted that the case now before the Court was not proper for a partition and inclosure by a Court of equity, but by Act of Parliament only, where facilities and benefits might be secured and objections and inconveniences obviated ; the former of which could not be extended, and the latter removed, if the present attempt to obtain a partition and inclosure in this Court should succeed.

Mr. Richards and Mr. Bell, for the plaintiff.

Sir Samuel Romilly and Mr. Hall, for the defendants.—A bill for a partition under these circumstances is without precedent. Partition is of common right between parceners, joint tenants, and tenants in common ; but it could not be compelled either at law or in equity, except amongst parceners, before the statute of Henry VIII. (a), which gave it to joint tenants and tenants in common of estates of inheritance ; and in the following year (b) it was extended to particular estates. It cannot be applied to interests of any description beyond those defined limits, comprising persons with characters ascertained, and rights perfectly clear. These persons are represented as quasi tenants in common. A tenancy in common may be of unequal, but not of unascertained shares. In the declaration between parceners or joint tenants, the demandant must state the title, and the distinct shares must appear between tenants in common ; the declaration must state the title and share of the plaintiff, and the shares though not the distinct titles of the defendants. The statute of William III. (c), for advancing this remedy, adding particular ceremonies, declares, that in default of appearance, the Court may proceed to examine the demandant's title, and the quantity of his purpart ; and shall for so much give judgment by default, and award writ to make partition, whereby such purpart may be set out in severalty. The partition can only proceed upon the title so ascertained on the face of the instrument, not by inquiries.

(a) Stat. 31 Hen. 8, c. 1, s. 2.

(b) Stat. 32 Hen. 8, c. 32, s. 1.

(c) Stat. 8 & 9 Will. 3, c. 31, repealed by S. L. Rev. Act, 1867.

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It cannot be maintained that common rights form no objection. The lord could not, except under the Statute of Merton (*a*), have inclosed or taken any part of the waste; and that statute gives the right of approving, with the qualification, that it shall not be to the prejudice of the commoners, for whom it requires sufficient to be left. Even for the purposes of inclosure, partition cannot be made in prejudice of that right, and much less for any other purpose. The statute of Edward VI. (*b*) accordingly declares the right of the commoner to pull down an inclosure by the lord infringing that right, and gives the remedy by assize, with treble damages. Formerly a greater degree of strictness prevailed upon partition here than in courts of law; and that appears to be Lord *Hardwicke's* opinion, in *Cartwright v. Pulleney* (*c*). In Lancashire, there are many instances of rights enjoyed by several persons, capable of being ascertained, but still uncertain, of which, therefore, they cannot be considered tenants in common; and, if ascertained, they could not remain two days without variation, fluctuating continually, according to the management, husbandry, and cultivation of the different proprietors.

This property, therefore, enjoyed in common, but by unascertained, indefinite shares, is incapable of partition. It is impossible to frame a declaration, as the ascertained part cannot be proved, and no inquiry can be directed for that purpose. Further difficulties arise, from the nature of the property, with reference to rights long exercised and enjoyed upon it, independent of the title of these proprietors; being stocked, the herbage taken, &c., as it is said, by persons having no right; but it might be common appendant, or because of vicinage; or common appurtenant, or in gross; by grant or prescription. A very formidable impediment is, the covenant against inclosing without mutual consent, which can be the only object of partition.

The form of the decree, in these cases, is not general. In *Curton v. Lyster* (*d*), which was much considered, the direction was, that the persons named, any three or two of them, should go to, enter upon, walk over, and survey the land, and make a fair partition, division, and allotment thereof in moieties: one to the plaintiff, the other to the defendant; and the parts so allotted to divide by metes and

(*a*) Stat. 20 Hen. 3.(*b*) 4 & 5 Edw. 6.(*c*) 2 Atk. 380.(*d*) Cited from a MS. note.

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bounds, and to examine witnesses upon such interrogatories, as they shall see occasion, &c. In some instances, close commissions were granted, the commissioners administering an oath of secrecy to the several persons before them. The commission in *Curzon v. Lyster* originally was so. But according to Lord *Redesdale's* clear opinion, that is erroneous; the commission is, in all respects, analogous to the writ of partition. The commissioners are to do what the sheriff and jury would have done, and have no power to make any inquiry, except as to the very lands to be divided. The commission being in particular ascertained forms, a new one cannot be directed, and certainly not such as is now required, with power to compel a production of title deeds, to examine witnesses, and then to go upon each separate estate, ascertain the value, and divide accordingly, asking, in the alternative, either a commission or a reference to the Master, for the purpose of all these inquiries. The result will be several distinct cases, producing all the inconvenience which the covenant against inclosure without mutual consent was intended to prevent.

Mr. *Richards*, in reply.—All persons supposed to have rights of common were made defendants, and all disclaimed except two, who are parties claiming right of common, without stint, annexed to houses, directly contrary to law. If there are any common rights subsisting, they cannot be affected by partition. Admitting that the shares are not ascertained, they may and will be done by the commissioners, who will ascertain the shares in which all these joint proprietors of the land are interested; and for that purpose some previous inquiry may be necessary. In *Calmady v. Calmady* (a), much previous investigation was required to ascertain the shares and to make the proper distinction as to the costs. This course must be taken in every case where the parties differ as to their respective interests, either by an inquiry before the Master, or some other means, as in the case of dower, which is as much a right at law as partition, and depends, in this Court, on much the same principle. The Court will find its way to the ultimate purpose; in the one case, the widow's right of dower; in the other, a partition among parties having an undivided interest, either as joint tenants, coparceners, or tenants in common.

(a) 2 V. jun. 568; Reg. Book, 1794, A. 460.

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This is clearly a tenancy in common: the trustees of Lord Fairfax, seised in fee of the whole, conveying distinct farms and shares of this moor to the several persons from whom these parties claim; under these circumstances, a partition is a matter of right; *Parker v. Gerard* (a). The shares are, in contemplation of law, ascertained, if they are capable of being ascertained, as they are, by reference to the prices paid by the several parties. In *Leigh v. Leigh*, a manor, an entire thing, was the subject of partition; and it was impossible to know the value of a moiety of a sixth part without knowing the value of the whole. The only parties to the cause were those who were entitled to a moiety of a sixth: the commissioners must, therefore, have taken into consideration a subject of property, in the hands of persons not parties, and the duty of the commissioners was not less difficult than what is required by this bill,—a valuation having regard to the lands possessed by parties in the cause; in that case, a valuation with reference to shares of a manor not belonging to any party in the cause. This plaintiff prays the Court to declare the rights according to this deed, and that the commissioners shall divide according to the rights so declared. That object must be obtained, if not through commissioners, by a reference to the Master, under all the circumstances; these parties being clearly tenants in common, entitled in shares to be ascertained by comparison of the different farms and respective interests in the moor. The commissioners are to exercise their judgment according to the original price, or rather the present value, which is the true construction; and for owelty of partition they may, in their discretion, give more to one than another.

The covenant not to inclose is merely a private engagement, and cannot be considered as binding the parties not to apply to the law of the country, as a covenant to refer to arbitration will not prevent the party's assertion of his right in a court of justice. This is a covenant inconsistent with the estate applicable only to certain cases, and cannot prevent partition for ever. Partition is not within the terms of a covenant not to inclose, and there may be great advantage from partition without inclosure. The commission in *Carton v. Lyster* was settled by the Master, the forms being very different.

Cur. ad. vult.

(a) Amb. 236; see *Warner v. Baynes*, Amb. 589; *Turner v. Morgan*, 8 V. 143.

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SIR W. GRANT, M.R.—There are two cases in which the Court referred it to the Master to ascertain the interest of the parties, and afterwards directed a commission to issue: *Colmanly v. Colmanly (a)*, and *Duncan v. Howell*. The uncertainty of the shares is not a ground for definitely refusing a partition; it is for refusing it at present. It cannot be referred to the commissioners to ascertain the interests: that must be done, as in those cases, by the Court, through the medium of the Master. In one of the cases, the form of the inquiry was, what undivided shares the several parties were entitled to, and for what estates and interests therein respectively.

The way in which it strikes me, is this. The parties have among them the whole interest in the soil and freehold, which they possess in common. Some of them seek a partition. It is said there cannot be a partition, on account of the uncertainty of their interests, the proportion to which each is entitled not being ascertained, that depending upon the quantity of interest each has in the estate of another, and the value of that estate, with reference to which value, the allotments of this moor are to be made among the parties, the owners of that estate, and of this moor also. That is no objection, as they are not the less tenants in common; though an operation must be performed before it can be ascertained to what undivided shares they were entitled as tenants in common. It must be seen what is the value of their shares in the other estate, by reference to which this allotment is to be made; and then they will be in the situation of parties having ascertained interests in this moor: but still they are tenants in common, and therefore have a right to a partition.

It seems to me to have been soundly objected, that it is impossible for the present situation to issue a commission, as then it must be referred to the commissioners: first, to ascertain their interests, and the proportions in which they are entitled, and then to make the allotment. The former was never done by commissioners. The Court is to ascertain the proportions and rights of the parties, and when that is done, then the duty of the commissioners begins, to make the division in those ascertained proportions.

An objection was then taken to the rights of common over this

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moor. The rights of common are no objection to the commission, as that right will not be in the least affected by the partition which regards only the freehold and inheritance of the soil. A partition never affects the interest of third parties. It is immaterial whether others have a right over that soil and freehold, which they have in common among them. These rights will equally remain.

It is then said, there is a covenant not to inclose, except by consent of all the parties. I do not exactly understand what is the meaning of that covenant. If it is only, as it is expressed to be, against inclosure, what has that to do with partition? Partition does not require inclosure, but only that an allotment shall be made by metes and bounds. Whether they may have a right to inclose afterwards may depend upon other circumstances. It may depend upon the rights of third persons over this land, and upon the agreement of the parties themselves. The covenant against inclosure may have its effect, and I am not now called upon to say, whether it shall or not.

It is then said, the rule by which the allotment is to be made, may be very unequal. It may be so, but it is a rule they have laid down for themselves. The inconvenience is of their own making, by the terms of their own agreement. If they were all agreed now, that there should be a partition, or that there should be an inclosure, this inconvenience as to the mode of making the valuation would still present itself.

There does not appear to me, therefore, in this case, anything to prevent a partition, after it shall have been ascertained what are the proportions in which the land is to be divided among the parties.

The decree declared, that the piece of land, called Bilbrough Moor, is to be allotted according to the present value of the several farms and lands in Bilbrough, purchased by Thomas March, &c., and conveyed to them by the several indentures of the 7th and 8th, and 12th and 13th of September, 1716, and of the farms, &c. retained by Fairfax and Hardwicke, and directed a reference to the Master, to inquire and state to the Court what undivided shares the plaintiff, and such of the defendants as had any estate of freehold or inheritance in the said moor, under the deeds of 1716, were entitled to or interested in the said moor, and for what estates and interests therein

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respectively, &c. ; and it was ordered that a partition should be made of Billbrough Moor among the plaintiff and the said defendants, who by the report should appear to be entitled to any shares of freehold and inheritance of Billbrough Moor, under the said deeds of 1716, according to such undivided shares thereof : and it was ordered, that a commission should issue for that purpose, all deeds in the power of the parties to be produced before the commissioners, with liberty to examine witnesses, &c. ; and it was ordered, that what should be allotted to the several parties, should be held and enjoyed by them in severalty, and, if any of the parties were under any disability, they, when capable, and all other proper parties, should join in executing proper conveyances, &c., for conveying and vesting the several shares in and to the said parties respectively, according to their several rights and interests of, in, and to their several undivided parts and shares of and in the said moor, the costs of the commission and inquiry, and of the defendant Parkin (the heir of Hardwicke), whose costs were ordered to be paid by the plaintiff in the first instance, to be borne by the parties interested in the moor, in proportion to what should be their respective shares and interests in it, with liberty to apply.

From this decree a petition of appeal was presented, submitting, that, having regard to the nature and uncertainty of the rights of the parties, as well as of the value, and the particular circumstances of this case, it is not a case for partition, inclosure, or any relief to be administered in a Court of equity.

Mr. Richards and *Mr. Bell*, for the plaintiff.—Since the case of *Warner v. Baynes* (a), the difficulty of making partition has formed no objection in this Court. * * * Tenants in common having a right to partition at law, there must be some mode of having a calculation, if necessary, before their precise rights as tenants in

(a) Amb. 589. See *Turner v. Morgan*, 8 V. 143. In that case the commission having been executed, an exception was taken by the defendant, on the ground that the commissioners allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. The Lord Chau-

cellor overruled the exception, saying, he did not know how to make a better partition for them; that he granted the commission with great reluctance, but was bound by authority; and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell.

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common can be ascertained. Whatever is capable of division may be the subject of partition: manors, for instance; with every right of the lord; and even the waste grounds are divided: *Sparrow v. Pritchard* (the case of the manor of Brighton (a)); *Lane v. Cox* (the manor of Rolleston, in the county of Derby). In *Parker v. Gerard* it was resisted. The property, situated in the north of England, consisted of cattle-gates, and of certain other rights, of a very peculiar nature; and partition was decreed in every minute fractions, according to the rights in the cattle-gates.

If there were other rights existing over this moor, that would not be an obstacle to partition among those persons having, by conveyance to the trustees, rights in the soil or freehold. * * * A covenant not to divide is not legal. There is no defect of parties: and the decree is right in form.

Sir Samuel Romilly and Mr. Hall, for the defendants.—There is no instance of such a bill as this; and the consequences it will lead to must be very important. * * * This is the case, not of all the owners except one agreeing, but of one, against the consent of all the rest, claiming a partition and conveyance, contrary to the express covenant, entered into on account of the difficulty, that there should be no partition unless they should all agree.

* * * All the authorities state, that a bill for partition is exactly the same as the writ at common law, with this single distinction, that, under the writ, those only are bound who are entitled to a subsisting estate of freehold, not those entitled in remainder, whom a Court of equity will bind as well as those who have particular estates: *Parker v. Gerard* (b); *Turner v. Morgan* (c).

* * * How can such a decree be executed? A considerable time may elapse between the report and the partition, and the value at the latter period, upon which the shares must depend, may be materially varied. The consequences of this jurisdiction may be easily imagined. Some of these estates having fallen to fomes covert, infants, or persons in remote situations, may have been suffered to deteriorate; and that moment would be seized, by a person who had improved this, taking advantage of the consequence

(a) Cited from the decree.

(c) 8 V. 143.

(b) Amb. 236.

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of superior wealth or the neglect of the others, to claim partition. For the very purpose of guarding against that, from a foresight of the difficulty, confusion, and injustice to which it would lead, was this covenant against inclosure, except by general consent, introduced. It is said, the covenant is void, as inconsistent with the nature of the estate, and it would be so; but this is the case, not of tenants in common, standing upon the common-law right, but of persons agreeing to hold, and looking to partition, in a mode not according to the law, protecting themselves against the improvidence of such an agreement in an unlimited way; and one of the parties to that special contract desires now to have a part performance, striking out that express provision for the consent of all. * * * Another difficulty arises from the rights of common of estovers and turbary, the bill stating the manner in which those rights have been always enjoyed.

The constant course of these decrees, is first to ascertain the shares, and then to come for a partition. * * * The reference, therefore, in the first instance, ought to be to ascertain, not the interests, but the value computing the outgoings, &c., so as to ascertain the value at the time of division. * * * This has not the character of a tenancy in common, in certain shares and proportions; and besides uncertainty, another objection is, that nothing passed immediately by this deed. The objection of uncertainty here is much stronger than in the case put by Walnesley in *Corbett's Case* (a), where the whole estate went to each on different days, but this consists of a great number of minute shares constantly varying. They may have unequal shares, as Lord *Hardwicke* observes (b); but they cannot be uncertain. * * * No instance can be produced of partition under this difficulty, arising from the number of shares constantly varying, and an express provision that they should remain unascertained and indefinite.

LORD CHANCELLOR ELDON.—The plaintiff in this cause is entitled to a partition; but the decree, though in terms as near as possible to the case of *Duncan v. Howell*, I think is not in form the exact decree authorised, under the circumstances of this case, by that

(a) Co. 76. See 78 a.

(b) 2 V. 81.

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precedent. The variation, however, will be in form merely, not in substance. The ground upon which the case of *Calmanly v. Calmanly* (a) proceeded was, that the plaintiff, showing title to a part of the estate, was entitled to a partition; and though the titles of the defendants were not proved, a reference to the Master was directed for the purpose of ascertaining them; and the report finding that the plaintiff and the defendants were entitled to the whole subject, upon further directions the decree was made for a partition according to the shares so ascertained. I cannot find any other instance of such directions given as to the costs. How can I make infants pay costs?

This Court issues the commission, not under the authority of any Act of Parliament (b), but *on account of the extreme difficulty attending the process of partition at law*; where the plaintiff must prove his title, as he declares, and also the titles of the defendants; and judgment is given for partition according to the respective titles so proved. That is attended with so much difficulty, *that by analogy to the jurisdiction of a Court of equity in the case of dower, a partition may be obtained by bill*. The plaintiff must, however, state upon the record his own title and the titles of the defendants; and, with the view to enable the plaintiff to obtain a judgment for partition, the Court will direct inquiries, to ascertain, who are, together with him, entitled to the whole subject. If, therefore, the state of the record, as originally framed, is not such as to authorise the Court to say, that the plaintiff and the defendants are respectively entitled in distinct shares, comprehending the whole subject, the proper course is to direct a reference to the Master, to ascertain what are the estates and interests of the plaintiff and defendants respectively; and, if it appears that they, or some of them, are entitled to the whole, then to order a partition, according to the rights of all, or such of them as appear entitled; dismissing the bill as against those who do not appear to have any right.

The decree in *Calmanly v. Calmanly* is perfectly regular; directing the inquiry, and afterwards a commission to issue, to divide the estate among the several parties, who appear upon the Master's report entitled to it. The omission in this decree to reserve further

(a) 2 V. jun. 568.

(b) Fonbl. 1, Treat. Eq. 18.

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directions, is a mere informality, in not reserving a mode of dismissing from the record those who may have no title. Considerable difficulty arises in this case, from the covenant not to enclose.

The order afterwards pronounced by the Lord Chancellor, directed the decree to be affirmed, with the alteration after mentioned; viz., instead of the words, "after the direction for the partition to be allotted, according to the present value of the several farms and lands in Bilbrough, purchased, &c.," inserting the following words: "in shares according to the present respective values of the several farms and lands in Bilbrough respectively purchased;" and adding a declaration, that the plaintiff, being entitled to an undivided part of the said piece of land, called Bilbrough Moor, has a right to call for a partition of the said piece of land, as between him and the several persons entitled to the rest of the said piece of land: such partition to be made according to the declaration before mentioned; and directing a reference to the Master, to inquire and state, whether the plaintiff and the defendants respectively, or any and which of them, are entitled to the freehold and inheritance of Bilbrough Moor; and how and if it shall appear, that all or any of them are so entitled to the said moor, then to ascertain the respective values of the farms and lands respectively purchased as aforesaid; and, having so ascertained the respective values of the said farms and lands, the Master is to ascertain, as among the plaintiff and the defendants, whom he shall find to be entitled to Bilbrough Moor, in what undivided shares they are respectively entitled according to the declaration before mentioned; and in that case, a commission to issue to divide the said moor among the plaintiff and defendants, who, by the report, shall appear entitled to any shares of the freehold and inheritance of Bilbrough Moor, under the deed of 1716, according to such undivided shares thereof; with the usual directions for the production of deeds, &c., and liberty to examine witnesses; the shares allotted to the several parties to be held and enjoyed by them in severalty; and, if any parties appearing entitled to shares in Bilbrough Moor, are under any disability, and not capable of making the conveyance, they, when capable, and all other proper parties, to join in all proper conveyances, &c., respectively, according to their several rights and interests of and in the several undivided shares of the said moor; and if the Master

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shall not find the plaintiff and defendants, or any of them, entitled to the freehold and inheritance of the said moor, to state that to the Court, before any further proceedings; and the consideration of costs and further directions was reserved, with liberty to apply.

The cause was heard (Dec. 11, 1810) for further directions, and upon the costs.

Mr. *Richards* and Mr. *Bell*, for the plaintiff.—They cited *Calmady v. Calmady* (a).

Sir *Samuel Romilly* and Mr. *Holl*, for the defendants.

LORD CHANCELLOR ELDON.—This is really the great question, how costs are to be paid on partition. Several cases have occurred since *Calmady v. Calmady*; and I wish to know whether the practice has been uniform. It is, I apprehend, universally true, that no costs are given, up to the hearing; of which I do not know an instance. As to the costs of making out the title being borne in proportion to the respective interests, that does not seem very just; as the expense may be greater of making out the title of a share worth 50*l.*, than of one of the value of 5,000*l.* On the other hand, the decrees are short, in not providing that the costs of infants and married women shall be borne by the share in respect of which they were incurred. My impression is, that all the subsequent decrees have followed *Calmady v. Calmady*.

(a) The decree in that cause ordered, that, when the defendant Hamlyn, an infant, should attain the age of twenty-one, the plaintiffs and the said defendant should execute mutual conveyances to each other of the several parts of the estate allotted to them; and in the meantime the plaintiffs and the defendant should hold and enjoy the several parts of the estate so allotted, &c.; and that the cost of

mission of partition, and also the costs of making out the title to the several parts of the said estate, be paid and borne by the plaintiffs and the said defendant, the infant, in the shares and proportions in which they are respectively entitled to the said estate under the said commission; and the decree provided for the raising the plaintiffs' costs, but not for the raising of the infant defendant's.

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The LORD CHANCELLOR gave judgment upon the question of costs; declaring (a) that, as the party came into equity, instead of going to law, for his own convenience, the rule of law should be adopted, and therefore, no costs should be given until the commission; that the costs of issuing, executing, and confirming the commission, should be borne by the parties, in proportion to the value of their respective interests; and there should be no costs of the subsequent proceedings (b).

NOTES.

1. Generally.
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1. Generally.

Although Mr. Hargrave, in his note to Co. Litt. 169 b, has treated the jurisdiction of equity to compel partition between joint owners of real estate, as of modern origin, and as trenching upon the writ of partition, and wresting from the Courts of common law their ancient exclusive jurisdiction over the subject, he cites a case in Tothill, so far back as the 40 Elizabeth c), which one might suppose would almost give the jurisdiction the sanction of antiquity. It is, indeed, by no means clear that Courts of common law exercised exclusive jurisdiction over the subject, as Mr. Hargrave has assumed; but be that as it may, the Court of Chancery most probably assumed concurrent jurisdiction, not only, as is laid down in the principal case, from the extreme difficulty attending the process of partition at law, but also from the inadequacy of Courts of law, by the writ of partition to deal properly with those cases in which partition was often desired. Many instances might be mentioned, in which the deficiency of Courts of law, in proceedings on the writ of partition, was supplied in equity, which appears, in an enlarged and liberal manner, to have acted upon the well-known rule of the Roman law: "*In communione*

(a) *Ex relatione.*

p. 216.

(b) See now as to costs, the Partition Act, 1868, s. 10, and cases cited post.

(c) See Toth. tit. "Partition."

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vel societate nemo compellitur invitus detineri (a). Upon the abolition of the writ of partition (*b*), equity acquired exclusive jurisdiction in cases of partition, and by s. 34, sub-s. 3, of the Supreme Court of Judicature Act, 1873, all causes and matters for the partition and sale of real estates are assigned to the Chancery Division of the High Court of Justice. But the statutes of Henry VIII. still provide for a partition being made between tenants in common, and recognise the right of the parties to it, although the common law writ was abolished as above stated (*c*).

2. When, and of what Property Partition may be ordered.

Difficulty of Partition.—The inconvenience or difficulty in making a partition has been held to be no objection to a decree (*d*). The absurdities to which this state of the law led, plainly pointed out the propriety of conferring upon the Courts, as has since been done, power in certain cases to order a sale instead of a partition of lands held in joint ownership. In the well-known case of *Turner v. Morgan* (*e*), there was a decree for a partition of a single house, and Sir Samuel Romilly in his argument mentions the case of one Benson, an attorney at Cockermouth, where the partition was actually carried into effect by building up a wall in the middle of a house (*f*). In *Mayfair Property Co. v. Johnston* (*g*), a garden wall was ordered to be partitioned, by dividing it longitudinally, and mutual conveyances were directed. Neither party in this case seems to have desired a sale (*h*). But it has never been considered necessary that every house on an estate should be divided, if a sufficient part of the whole could be allotted to each; and in making a division the Court would take the convenience of the parties into consideration (*i*).

Overriding Trust.—Where there are active trusts to be performed which may for some purpose require, in order that the testator's intention should be carried into effect, that the property should remain as an entirety in the trustees, no judgment for partition or sale can be made (*k*). For instance, where powers are given of working quarries

(a) Cod. Lib. 3, tit. 37, l. 3; Story Eq. Jur. (1892), p. 426.

(b) See 3 & 4 Will. 4, c. 27, s. 36.

(c) *Mayfair Property Co. v. Johnston*, (1894) 1 Ch. p. 513.

(d) *Warner v. Baynes*, Amb. 589; *Parker v. Gerard*, Amb. 236.

(e) 8 V. 143.

(f) See the note, ante, p. 190.

(g) (1891) 1 Ch. 508.

(h) See line 8 of the report, p. 511.

(i) See *Clarendon v. Hornby*, 1 P. W. 446; *Watson v. Northumberland*, 11 V. 162; *Lister v. L.*, 3 Y. & C. Ex. Ca. 540.

(k) *Taylor v. Grange*, 15 C. D. p. 168; *Cass v. Wood*, 30 L. T. 670.

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and making roads for that purpose (*a*); where the testator has fixed the time at which a sale is to be made (*b*), where a discretionary *trust* for sale is given (*c*). But where a mere power of sale is given for the purposes of division, a partition might be ordered, but would not be so if asked for vexatiously (*d*).

Disputed Legal Title.—A suit for partition being based on the assumption that there is no litigation, it has been held that a bill for a partition could not be made the means, even under *Roll's Act* (*e*), for trying a disputed legal title. Thus in *Slade v. Barlow* (*f*), a plaintiff claiming to be legally entitled to an undivided share in a freehold estate, filed a bill for partition, raising the question, whether upon the construction of the settlor's will, the estate passed under a specific or under a residuary devise; it was held by *James, V.-C.*, that the Court had no jurisdiction to try such a question in a partition suit, and the bill was ordered to be retained for a year with liberty to the plaintiff to bring such action as he might be advised (*g*).

Of what Property.—Freeholds have always been subject to partition, but copyholds and customary freeholds were first made so by 4 & 5 Vict. c. 35, s. 85, and see now the Copyhold Act, 1894, s. 87; nevertheless, before the passing of the 4 & 5 Vict. c. 35, the Court might decree specific performance of an *agreement* to divide copyholds (*h*); or where there were both freeholds and copyholds to be divided, the Court might direct such a partition as to give the entire copyhold to one party, and the freehold, or a part of the freehold, to the other (*i*).

Leaseholds, also, under the statute 32 Hen. 8, c. 32, s. 1, were subject to a partition during the term, at the instance of the tennor of an undivided share (*k*), and the rent was apportionable (*l*), but the Court has refused to decree partition of leaseholds where the landlord might immediately apply for an injunction to restrain the

(*a*) *Taylor v. Grange*, 15 C. D. p. 168; *Cass v. Wood*, 30 L. T. 670.

(*b*) *Swain v. Denby*, 14 C. D. 326.

(*c*) *Biggs v. Peacock*, 22 C. D. 284.

(*d*) *Boyd v. Allen*, 24 C. D. 622.

(*e*) 25 & 26 Vict. c. 42.

(*f*) 7 Eq. 296.

(*g*) *Potter v. Waller*, 2 De G. & Sm. 410; *Evans v. Bigshaw*, 8 Eq. 469; *Giffard v. Williams*, 5 Ch. 546; *Bolton v. B.*, 7 Eq. 298, n.; *Moore v. Kempston*, 4 Ir. Rep. Eq. 306; *Ward v.*

W., 18 W. R. 87; but see now *Burt v. Hellyer*, 14 Eq. 160; *Waite v. Bingley*, 21 C. D. p. 681; *Judicature Act*, 1873, s. 24, s.s. 7; *Seton* (1893), p. 1531.

(*h*) *Bolton v. Ward*, 4 Ha. 530.

(*i*) *Dillon v. Coppin*, 6 B. 217, n.; *Jope v. Morshhead*, 6 B. 213; *Clarko v. Clay*, 2 Gif. 333; *Bowles v. Rump*, 9 W. R. 370.

(*k*) *Baring v. Nash*, 1 V. & B. 551.

(*l*) *Ames v. Comyns*, 16 W. R. 74.

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parties from executing it by any act amounting to waste (*a*); or where the Court could not protect one of the tenants in common from a breach of covenant, which might be committed by the other (*b*); and it seems, if the lessor had reserved to himself powers against his lessee, such as of entry, to work minerals, or cut timber, the Court would not have thought the case within the statute (*c*), so as to decree partition to the termor in his absence (*d*).

Partition has also been decreed of a manor (*e*); of an advowson (*f*); of tithes (*g*); of rent charges (*h*); and see (*n*.) "Difficulty of Partition," p. 197.

3. Who may Claim Partition.

Legal or Equitable Possession Necessary.—A person can only compel partition if entitled *in possession* (*i*), or entitled to call for the legal possession (*k*), or if entitled, subject to a mortgage, of the whole (*l*). Such an action does not lie at the suit of a reversioner or remainderman (*m*), and a person seeking partition of leaseholds must obtain probate before relief can be granted (*n*).

Coparceners Joint Tenants, &c.—Coparceners only, had at common law a right to compel partition (*o*), but by the Statute of Partition (*p*), joint-tenants and tenants in common of any estate of *inheritance* in their own right, or in right of their wives, might be compelled to make partition between them, and by 32 Hen. 8, c. 32, s. 1, joint-tenants and tenants in common for lives or years are declared compellable to make partition in the same way, and an infant tenant in common or joint-tenant may commence an action for partition (*q*).

Tenants for Life and Years.—Subject to the power conferred

(*a*) *North v. Guinan*, Bent. 342.

(*b*) *Ib.*

(*c*) 32 Hen. 8, c. 32.

(*d*) *Ib.*

(*e*) *Sparrow v. Friend*, Dick. 348; *Hanbury v. Hussey*, 14 B. 152; *Ley v. Cox*, *Ib.* 157; *Cattley v. Arnold*, 4 Kay & J. 595.

(*f*) *Bodicoate v. Steer*, 1 Dick. 69; *Matthews v. Bishop of Bath, &c.*, 2 Dick. 652; *Seymour v. Bennett*, 2 Atk. 483; *Johnstone v. Baber*, 6 Do G. M. & G. 439; *Young v. Y.*, 13 Eq. 174.

(*g*) *Bassett v. Knollys*, 1 V. 494.

(*h*) *Rivis v. Watson*, 5 M. & W. 255.

(*i*) Co. Lit. p. 167 a; *Evans v. Bagshaw*, 8 Eq. 469.

(*k*) *Taylor v. Grange*, 13 C. D. 226; 15 C. D. 168, and cf. *Cartwright v. Pulteney*, 2 Atk. 380.

(*l*) *Waite v. Bingley, &c.*, 21 C. D. 674, cited *infra*, p. 200.

(*m*) *Evans v. Bagshaw*, *supra*.

(*n*) *Pinney v. Hunt*, 6 C. D. 98.

(*o*) Co. Lit. 169 a.

(*p*) 31 Hen. 8, c. 1.

(*q*) *Tuckfield v. Buller*, Amb. 197.

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upon the Court by the Legislature under the Partition Acts, 1868 and 1876, to direct a sale instead of a partition, a decree of partition is a matter of right (*a*). Consequently, a decree may be obtained either by or against a person having only a limited interest, as tenant for life (*b*); or a tenant for life determinable upon marriage (*c*); a tenant by the curtesy (*d*); a tenant for a term (*e*); and where there are remaindermen who may come into esse and be entitled, they will be bound by a decree made against the tenant for life (*f*), and in *Martyn v. Percymann* (*g*), the Court decreed a partition, notwithstanding *femes coverts*, infants, and incumbrancers, were concerned.

Tenant in Tail—A tenant in tail also may compel partition (*h*), and it has been decided that a partition between tenants in tail, though but by parol, bound the issue (*i*).

Lunatics, &c.—It is now settled that the next friend of a lunatic not so found may bring an action for partition, but no order for sale will be made until the Court is satisfied that it is for the benefit of the person of unsound mind (*k*). A lunatic may also be a defendant to such an action (*l*).

Mortgagor.—A mortgagor cannot sue for partition unless his mortgagee joins, for he has not the possession (*m*), and the nature of the property would be altered by the judgment (*n*). But if the mortgage is of the whole estate, one mortgagor can, subject to the rights of the mortgagees, who are not necessary parties, and whose rights are not affected, maintain an

(*a*) *Baring v. Nash*, 1 V. & B. 554; *Parker v. Gerard*, Amb. 236; *Mayfair Property Co. v. Johnston*, (1894) 1 Ch. p. 513.

(*b*) *Gaskell v. G.*, 6 Si. 643.

(*c*) *Hobson v. Sherwood*, 4 B. 184.

(*d*) Co. Litt. 175 b.

(*e*) *Baring v. Nash*, 1 V. & B. 551; *Heaton v. Dearden*, 16 B. 147.

(*f*) *Wills v. Slade*, 6 V. 498; *Gaskell v. G.*, 6 Si. 643.

(*g*) 1 Ch. R. 235.

(*h*) *Brook v. Hertford*, 2 P. W. 518.

(*i*) *Burton v. Jeux*, 2 Vern. 232, cited in *Rose v. R.*, 1b.

(*k*) *Porter v. P.*, 37 C. D. 420, explaining *Halfside v. Robinson*, 9 Ch. 373; *Watt v. Leach*, 26 W. R. 475;

Re Bolton, W. N. (88) 243; *Willis v. W.*, 38 W. R. 7; *Crook v. C.*, W. N. (90) 26.

(*l*) As to the form of order, see *Re Blooman*, 6 W. R. 178; and see further as to such persons, *Re Molyneux*, 10 W. R. 512; *Cowper v. Harmer*, 57 L. J. (N. S.) 60; *Re Watson*, 58 L. T. 509; *Sington v. Hopkins*, 4 W. R. 107; *Moorehead v. M.*, 2 Ir. Rep. Eq. 492; *Re Sherard*, 4 De G. J. & S. 421; the Partition Act, 1868, s. 7, *infra*; the Trustee Act, 1850, s. 30; the Lunacy Act, 1890, s. 120; the Trustee Act, 1893, s. 30.

(*m*) *Watkins v. Williams*, 3 Mac. & G. 622.

(*n*) *Gibbs v. Haydon*, 30 W. R. 726.

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action against his co-tenant (*a*). In *Sinclair v. Jones* (*b*), the owner of the equity of redemption in a third share, subject to overriding mortgages over the whole, brought an action for partition and made the overriding mortgagees parties defendant. The action was on motion (*c*), dismissed as against the mortgagees of the entirety and the separate mortgagee of the plaintiff's share.

Mortgagee.—A mortgagee of an undivided share may commence an action for foreclosure and partition, and may move for a receiver of the rents of the undivided share of the mortgagor (*d*).

Legal Title.—It is essential to partition that the legal title should be before the Court (*e*), so where one of several tenants in common made a lease of his undivided share for 99 years, it was held that the lessee was a necessary party to a bill for partition (*f*), but a mortgagee of the entirety was not (*g*). Executors and trustees for sale of leaseholds, and devisees in trust, sufficiently represent those beneficially entitled (*h*).

Parties.—Since the Act of 1868 it is only necessary that a competent plaintiff and defendant should be named on the writ. Service of a notice of judgment under sect. 9 of that Act will now be sufficient to bind persons who formerly were made parties in the first instance, and if such service is dispensed with under sects. 3 and 4 of the Partition Act, 1876 (*i*), parties interested may be bound as if served. An annuitant whose annuity is charged on the whole of the estate, is not a necessary party to a partition action (*k*).

Title.—The title of the plaintiff to an interest in the property of which he seeks partition must be clearly stated, and where he could show none, his bill has been dismissed (*l*). The title of the defendant

(*a*) *Waite v. Bingley*, 21 C. D. 674; *Swan v. S.*, 8 Price, 518; *Watkins v. Williams*, 3 Mac. & G. 622.

(*b*) (1894) 3 Ch. 554.

(*c*) Under R. S. C., 1883, O. 25, r. 4.

(*d*) *Fall v. Elkins*, 9 W. R. 861; *Davies v. D.*, 6 Jur. (N. S.) 1320; cf. *Robinson v. Aston*, 9 Jur. 224; *Re Hawkesworth*, L. R. Ir. 1 Eq. 179.

(*e*) *Miller v. Warmington*, 1 J. & W. 493.

(*f*) *Cornish v. Gest*, 2 Cox, 27.

(*g*) *Swan v. S.*, 8 Price, 518; *Clarke*

v. Clayton, 2 Gif. 333; *Bowles v. Rump*, 9 W. R. 370; *Greenwood v. Percy*, 26 B. 572.

(*h*) *Staco v. Gago*, 8 C. D. 451; *Simpson v. Denny*, 10 C. D. 28; R. S. C., 1883, O. 16, r. 8.

(*i*) *Infra*, p. 218.

(*k*) *Hixon v. Eastwood*, W. N. (1868), p. 13; *Poole v. P.*, W. N. (1885), p. 15. See "Rights of Third Parties," p. 204.

(*l*) *Parker v. Gorard*, Amb. 236; *Jopo v. Morshoad*, 6 B. 213.

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may be alleged generally (*a*). The rule now, except in simple cases, is to send a reference as to the title to Chambers (*b*), and also inquiries as to who are the persons interested, and for what estates and interests, and whether they are parties to the action, &c. (*c*). It seems, however, that a defendant in a partition suit was not entitled of right as against a co-defendant to an inquiry as to title (*d*). The uncertainty, therefore, of what are the shares of the different parties, is an objection, not to partition altogether, but to partition until such shares have been ascertained.

If the property is very small and the case simple, an immediate sale may be ordered on evidence showing the persons interested (*e*).

4. Mode in which Partition is Effected.

It is not the ordinary practice to issue a commission for the purpose of making a partition, as a partition can now be made more satisfactorily and much more cheaply by a Judge, in Chambers where inquiries are necessary, or at the hearing (*f*).

Commission.—Where commissioners are appointed for a partition the procedure is by summons (*g*).

The duties of commissioners in making their allotment are well set forth by *Kindersley, V.-C.*, in *Canning v. C.* (*h*).

Judgment in Partition Actions (see p. 214).—Subject to the Partition Acts, a tenant in common, &c., is still entitled to an *actual partition* of the property held in common (*i*). In a judgment for partition the equitable rights of all the parties interested in the estate will be adjusted (*k*). Thus, although in point of law a defendant to a bill for partition might not have a lien on the premises for money expended in buildings and improvements, plaintiffs have not been allowed to

(*a*) *Cartwright v. Pulteney*, 2 Atk. 380.

(*b*) *Hawkins v. Herbert*, 37 W. R. 300; *Wood v. Gregory*, *infra*; cf. *Re Stedman*, 58 L. T. 709.

(*c*) See *Seton* (1893), p. 1533.

(*d*) *Backhouse v. Paddon*, 14 W. R. 273; and see note, "Disputed legal title," *supra*, p. 198.

(*e*) *Wood v. Gregory*, 43 C. D. 82; *Re Stedman*, *supra*; *Goodacre v. G.*, W. N. (1888) 138.

(*f*) See the Forms of Judgment for Partition, *Seton* (1893), p. 1533.

(*g*) See *Howard v. Barnwell*, 2 N. R. 414; *Seton*, 1 ed., 189; *Dan.*, 6 ed., p. 1336; *Seton*, 5 ed., 1561—1568.

(*h*) 2 Drew. 436; and see *Watson v. Northumberland*, 11 V. 153; *Corbet v. Davenant*, 2 Bro. Ch. 252; *Clarendon v. Hornby*, 1 P. W. 446.

(*i*) *Mayfair Property Co. v. Johnston*, (1894) 1 Ch. 508.

(*k*) *Story v. Johnson*, 2 Y. & C. 586.

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take advantage of that expenditure without making an allowance: the Court, therefore, has refused to interfere but on such terms, and has ordered a reference to take an account of what has been expended necessarily, or with the concurrence of the plaintiff (a).

And where one joint owner appears to have received more than his share of the rents and profits of the estate, the Court has directed an account (b), or where he had been in possession, he has been charged an occupation rent (c).

A tenant in common, however, occupying the premises, but admitting some co-tenants, and not excluding any, has been held not so chargeable (d), but he has been held to be chargeable if he excluded the others (e). However, unless a tenant in common in possession submits to be charged with an occupation rent, he will not be entitled to any account of substantial repairs and lasting improvements on any part of the property (f).

In *Re Jones* (g) the owner of a moiety, who was also tenant for life of the whole, borrowed money on mortgage, which was with other moneys spent in permanent improvements of the property. In an action for partition after her death it was held, that the present value of the improvements, not exceeding the sum originally borrowed, must be borne rateably by the owners of both moieties.

A sum due in respect of occupation rent may be charged upon the particular share on further consideration (h).

The judgment may also direct that a sum be paid to one or the other of the parties for equality of partition (i).

And now in an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the Court has jurisdiction under the Judicature Act, 1873, s. 25, subs. 8, to appoint a receiver until the hearing, unless such co-owner elects to pay an occupation rent (k).

A mill may be divided by giving to the parties every other toll-

(a) *Swan v. S.*, 8 Price, 318, doubted by *Pearson, J.*, in *Leslie v. L.*, 23 C. D. p. 364; *Leigh v. Dickeson*, 15 Q. B. D. 61, approved by *North, J.*, in *Re Jones*, (1893) 2 Ch., p. 478.

(b) *Lorimer v. L.*, 5 Madd. 363; *Hill v. Fulbrook*, Jac. 574; *Story v. Johnson*, 1 Y. & C. 598; 2 Y. & C. 586; *Hyde v. Hindly*, 2 Cox, 408.

(c) *Turner v. Morgan*, 8 V. 145.

(d) *M'Mahon v. Burchell*, 5 Ha. 322.

(e) *Pascoe v. Swan*, 27 B. 508.

(f) *Tensdale v. Sanderson*, 33 B. 534; explained by *North, J.*, in *Re Jones*, *infra*.

(g) *Re Jones*, (1893) 2 Ch. 461.

(h) *Graham v. Cole*, Seton (1893), Form 19, p. 1541.

(i) *Watson v. Gass*, 30 W. R. 286; Seton (1893), Form 11, p. 1566.

(k) *Porter v. Lopes*, 7 C. D. 358.

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dish, as would have been done at law in case of the writ *de partitione faciendi*; and in this case *equitas sequitur legem* (a), and an advowson may be divided by giving every other presentation to the church (b). In the case, however, of *Johnstone v. Baber* (c), the right to present to an advowson being vested in tenants in common, it was held that the right to nominate was not to be exercised according to seniority, but was to be determined by lot (d). In such cases, even under the old law, the Court would, it seems, direct the partition at once, by decree, without resorting to a commission (e). But under the present law, the Court, in the case of any advowson, would order it to be sold, and the proceeds to be divided amongst the parties according to their interests (f); because by reason of the nature of such property a sale, and a distribution of the proceeds thereof, after payment of costs, would be more beneficial for the parties interested than a partition of the property between them.

Rights of Third Parties.—A partition never affects the rights of third parties; for instance, in the principal case, it was held, that the rights of common of others over the soil and freehold, which the parties to the bill had in common amongst them, would not be affected by the partition. So, where an action was commenced for a partition of an estate by the owner of one moiety against defendant owning the other moiety, it was held, that an annuitant whose annuity was a charge on the whole estate, was not a necessary party to the action, but the order was drawn up with a declaration that it was without prejudice to the rights of the annuitant, and that *inter se* each of the parties to the action was liable to pay one half of the annuity (g).

Where, in a suit for partition, the defendants are desirous that there shall be no partition of their several shares, the partition may be confined to the aliquot share of the plaintiff (h).

Conveyances.—A partition at law vested the legal estate (i). A judgment for partition in the Chancery Division vests the equitable right only, and must be completed by conveyances or their equivalent.

(a) *Clarendon v. Hornby*, 1 P. W. 447, per Lord Macclesfield.

(b) *Ib.*

(c) 6 De G. M. & G. 439.

(d) *Seton* (1893), Form 13, p. 1567.

(e) *Bodicoate v. Steer*, 1 Dick. 69; *Seton* (1893), Form 12, p. 1566.

(f) *Young v. Y.*, 13 Eq. p. 175, n.

(g) *Poole v. P.*, W. N. (1885), p. 15. See as to mortgagees, (n.) "Mortgagor," *supra*, p. 200.

(h) *Hobson v. Sherwood*, 4 B. 184.

(i) *Whaley v. Dawson*, 2 Sch. & L. 372; *Miller v. Warmingtton*, 1 J. & W. 493.

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The judgment on further consideration for partition contains, therefore, directions for the execution of mutual conveyances, and for the disposal of the title deeds, &c. (*a*).

Where the shares have been allotted to each of the parties, the partition is perfected by reciprocal conveyances; and one party cannot impose upon another as a condition of his executing a conveyance, that all the other parties must join in the conveyance to him (*b*).

On the death, after judgment, of a person entitled to a share, the Court will direct, in case he has devised it, that it should be allotted to his devisee (*c*).

Where the shares of the parties were very minute and complicated, the Court, in order to save expense, instead of directing a conveyance of the several shares, has declared each of the parties trustees as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee under the Trustee Acts, with directions to convey to the several parties their allotted shares (*d*).

Infants.—Where infants were parties, the conveyances formerly were respited until they came of age, and a day given them to show cause against the decree (*e*), but the practice now is to direct a conveyance at once, and then to declare the infant a trustee without giving him a day to show cause (*f*).

Title Deeds.—Where parties to a partition action are equally interested, the custody of the deed of partition and other deeds is given to the plaintiff; but if they are not, then they are usually given to the person who has the largest interest in the property (*g*). Where a great many persons were interested in a partition deed, it was directed to be enrolled, with liberty to any party to have a duplicate at his own expense (*h*). But if any of the deeds relate

(*a*) Seton (1893), p. 1559; *Mayfair Property Co. v. Johnston*, (1894) 1 Ch. p. 515; and as to title-deeds, see *infra*.

(*b*) *Orgor v. Spark*, 9 W. R. 180; and see *Bowra v. Wright*, 4 De G. & Sm. 265.

(*c*) *Valentine v. Middleton*, 2 Ir. Ch. Rep. 93.

(*d*) *Shepherd v. Churchill*, 25 B. 21; and see Partition Act, 1868, s. 7, *infra*, and *Beckett v. Sutton*, 30 W. R. 490.

(*e*) See *Brook v. Hertford*, 2 P. W. 518, 519; *Tuckfield v. Buller*, 1 Dick. 240, Amb. 197; *Thomas v. Gyles*, 2 Vern. 232; *Wills v. Slade*, 6 V. 498; *A.-G. v. Hamilton*, 1 Madd. 214.

(*f*) Per *Kay, J.*, in *Mellor v. Porter*, 25 C. D. p. 161; and see Partition Act, 1868, s. 7, *infra*.

(*g*) *Elton v. E.*, 27 B. 633; see *Jones v. Robinson*, 3 De G. M. & G. 911.

(*h*) *Elton v. E.*, 27 B. 632.

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solely to any distinct part of the property allotted to any party, they will be delivered to him (*a*). The deeds are sometimes ordered to be deposited in the Central Office for the mutual benefit of the parties (*b*).

5. Partition and Sale under the Partition Acts.

The Partition Acts, 1868 and 1876, have very usefully increased the jurisdiction of Courts of equity, now assigned to the Chancery Division by Judicature Act, 1873, s. 34, s.s. 3, to direct sales instead of partitions.

The Partition Act, 1868 (31 & 32 Vict. c. 40).

S. 3. "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court, that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested, or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested, than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions."

"**Suit for Partition.**"—See the definition given in the Act of 1876, s. 7, *infra*, p. 221.

"**Where, if this Act had not been passed,**" &c.—These words, which occur in this and the two next sections, limit the operation of the Act to those cases in which partition might have been decreed before it was passed: as to which see Parts 2 and 3, *supra*.

"**More beneficial.**"—That is in a money sense (*c*). The onus of proof is on those seeking a sale (*d*). The Court has ordered, as being more beneficial to the parties than a partition, the sale of an

(*a*) *Jones v. Robinson*, 3 De G. M. & G. 911.

(*b*) *Seton* (1893), p. 1570, and *Forms*, *Ibid.* p. 1559.

(*c*) *Drinkwater v. Radcliffe*, 20 Eq.

523—528; *Fleming v. Crouch*, W. N. (1884) 111.

(*d*) *Huddersfield v. Jacomb*, W. N. (1871) 80.

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advowson (*a*); of a farm house and thirty acres of land divisible into thirty-six shares (*b*); of an estate comprising a first-class mansion, with a park of nearly 200 acres, above 3,000 acres of agricultural land, and a manor the rights of which extended over thirty square miles, divisible in moieties (*c*); and in Ireland, of an estate during the minority of three of the defendants, although there was a direction in the will under which they derived their interest in the estate that no sale should take place until the youngest of them should attain twenty-one (*d*).

"If it thinks fit."—The power is discretionary (*e*), and will not as a rule be interfered with on appeal (*f*).

"On the Request."—This is an absolute power of sale on the request of anybody, provided the Court is satisfied that it would be more beneficial for the parties interested than a division (*g*).

As to requests for sale by persons under disability, see the Act of 1876, s. 6 (*h*). A sale has been ordered at the request of a mortgagee (*i*).

"Direct a Sale."—This section gives power to the Court to sell for certain reasons. These reasons are specified in every case but one. The reasons specified are—the nature of the property, the number of the parties interested, the absence or disability of some of the parties. The reasons are unspecified in one case, viz., where by reason of any "other circumstance" a sale of the property and distribution of the proceeds would be more beneficial to the parties interested than a division of the property between or among them. Whenever that happens, and any party interested applies for a sale, the Court may direct a sale (*k*).

And the Court, if it thinks it to be beneficial so to do, may order a sale at request of parties holding a small amount of shares against the wishes of those holding a very much larger amount. Thus, it has been held that a sale might be ordered at the request of a

(*a*) *Young v. Y.*, 13 Eq. 173.

(*b*) *Drinkwater v. Radcliffe*, 20 Eq. 528.

(*c*) *Pemberton v. Barnes*, 6 Ch. 685.

(*d*) *Thompson v. Richardson*, 6 Ir. Rep. Eq. 596; see also *Pitt v. Jones*, 5 App. Cas. 651.

(*e*) *Pemberton v. Barnes*, *supra*.

(*f*) *Dyer v. Paynter*, 33 W. R. 806.

(*g*) *Per Jessel, M.R.*, in *Drinkwater v. Radcliffe*, *supra*.

(*h*) *Post*, p. 220.

(*i*) *Davenport v. King*, 43 L. T. 92.

(*k*) *Drinkwater v. Radcliffe*, *supra*.
See (*n.*) "Judgments," &c., p. 214.

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person holding one-tenth against parties holding the other nine-tenths (*a*). But the onus lies on the owners of the smaller share who desire a sale, of showing that it is, under the circumstances, the most beneficial course for *all parties* (*b*).

S. 4. "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

"Parties Interested * * * to Extent of One Moiety."—Where the owners of a moiety ask for a sale under this section, it is imperative on the Court to order a sale, unless it sees good reason to the contrary; that is to say, the onus is thrown on the persons who say that the Court ought not to order a sale, to show some good reason why it should not do so; otherwise the Court is bound to order it (*c*). The mere fact that the owners of the other moiety oppose a sale is not a sufficient reason to the contrary. "It would," said *Hatherley, C.*, "be striking the 4th section out of the Act to say that the owners of the other moiety have no more to do than to come and say 'we do not wish for a sale'" (*d*).

With regard to the question who can be considered owner of a moiety, where real estate was settled as to one moiety to the separate use of P., a married woman, for life, with remainder as she should, notwithstanding coverture, by will, appoint, and in default to T., it was held, that although if M. did not appoint, her share would go over, she was the owner of one moiety of the estate within the meaning of the 4th section (*e*). A mortgagee is a person interested (*f*).

"Request the Court."—The request may be withdrawn and a partition asked for (*g*).

(*a*) *Pemberton v. Barnes*, 6 Ch. 699.

(*b*) *Allen v. A.*, 21 W. R. 842.

(*c*) *Pemberton v. Barnes*, 6 Ch. 693; *Lys v. L.*, 7 Eq. 126, 128; *Porter v. Lopes*, 7 C. D. 358; *Fleming v. Crouch*, W. N. (1884) 111.

(*d*) *Pemberton v. Barnes*, *supra*.

(*e*) *Parker v. Trigg*, W. N. (1874), p. 27.

(*f*) *Davenport v. King*, 49 L. T. 92.

(*g*) *Williams v. Games*, *Pitt v. Jones*, *infra*; and see Partition Act, 1878, s. 6, *infra*.

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"Shall unless . . . good reason to the contrary direct a Sale."
 —That is, shall direct a sale, irrespective of the nature of the property, irrespective of the number of persons, irrespective of absence or disability, irrespective of any special circumstances which make the Court think it beneficial. The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shown; they have not to show any reason for the sale, but a reason to the contrary must be shown (*a*).

The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for commercial purposes, and also resides thereon, is no sufficient reason why a sale of the property should not be decreed hereunder (*b*). The fact, moreover, that the income of an infant defendant, interested in a moiety of the property in question, might be materially diminished by the Court directing a sale, is not a sufficient reason within the meaning of the section, against the Court directing a sale when asked for by the owner of the other moiety (*c*).

In a case in Ireland it has been laid down that the only "good reason to the contrary" is to show affirmatively that there is no difficulty in making an actual partition (*d*). See further as to "good reason," *Pemberton v. Barnes* (*e*), and *Sutton v. Bartley* (*f*).

S. 5. "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if any party interested in the property to which the suit relates, requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property and give all necessary or proper consequential directions; and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale, in such manner as the Court thinks fit, and may give all necessary or proper consequential directions."

(*a*) Per *Jessel*, M.R., in *Drinkwater v. Radcliffe*, 20 Eq. 530; *Pitt v. Jones*, 3 App. Cas. 661.

(*b*) *Wilkinson v. Joberns*, 16 Eq. 14; *Roughton v. Gibson*, W. N. (1877) (V.-C. B.), p. 32.

(*c*) *Rowe v. Gray*, 5 C. D. 263; *Roughton v. Gibson*, 36 L. T. 93, p.

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32, 23 W. R. p. 269; but see *Langmead v. Cockerton*, 25 W. R. 315; *Porter v. Lopes*, *Fleming v. Crouch*, *supra*.

(*d*) *Re Langdale's Estate*, 5 Ir. R. Eq. 572; *Re Whitwell*, 19 L. R. Ir. 45.

(*e*) 6 Ch. 693.

(*f*) 48 L. J. Ch. 519.

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"May * * unless the other Parties * * undertake."—It is clear that the 5th section was intended for the benefit of part-owners who desire a sale; in which case the other parties interested who object to a sale may be compelled to buy the shares or have a sale, but there is nothing to compel a man to sell his shares at a valuation (a). The construction to be put upon the 5th section has been well explained by *Jessel, M.R.*, in *Drinkwater v. Rodcliffe* (b). "The 5th section," says his Lordship, "provides that, if any party interested in the property requests the Court to direct a sale of the property instead of a division, the Court may, if it thinks fit (this is discretionary), unless the other parties interested in the property undertake to purchase, give all necessary and proper directions for such sale. What does that mean? Under the 4th, where the parties requesting a sale have got more than a moiety, you do not want that; it consequently applies to the case of the owners of less than a moiety making the request. Now that case is provided for by the 3rd section; in every possible case where the Court thinks a sale is proper and for the benefit of the parties interested. Therefore the 5th must apply to a case where the Court sees no reason for preferring a sale to a partition. That case is not provided for by the 3rd, nor is it provided for by the 4th section. Where the Court sees no reason at all, still any party interested may apply; and then there is a limit imposed, and the limit is this, that the Court shall not exercise the new power given by the 5th section, which depends entirely upon the caprice of the party asking, without any opinion of the Court being expressed, if other people will buy. That is a check upon the new power—not, as it has been supposed to be, a limitation of the 3rd and 4th sections (c); but it is a new power given to any party, whether plaintiff or defendant, to apply with or without any reason whatever, to the Court for a sale, and he is entitled to ask for it unless somebody is going to buy; and then *Williams v. Games* says that if he does apply for it and somebody else does offer to buy his share, he may withdraw his request. That is my view of the law." This section does not qualify or control section 3, but is an independent clause giving an entirely new power (d). A party asking for a sale cannot be compelled to part with his share at a valuation, and the Court cannot order a sale if an undertaking be offered (e). The

(a) *Williams v. Games*, 10 Ch. 204.

(b) 20 Eq. 331.

(c) See *Pitt v. Jones*, *infra*.(d) *Pitt v. Jones*, 5 App. Cas. 659.(e) *Ibid*.

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undertaking to purchase ought to be given at the hearing (*a*), and may now be given, as in the case of a request for sale, by a party under disability (*b*). The onus of showing some good reason for ordering a sale hereunder is on the applicant (*c*), and the Court is not bound to order a sale hereunder, even if none of the persons interested undertake to purchase (*d*).

S. 6. "On any sale under this Act, the Court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale on such terms as to non-payment of deposit, or as to setting-off or accounting for the purchase-money, or any part thereof, instead of paying the same, or as to any other matters, as to the Court seem reasonable."

"The Court may."—Although as a general rule parties having the conduct of a sale are not allowed under the 6th section to bid (*e*), the Court, nevertheless, has, under peculiar circumstances, allowed this to be done (*f*). In another case on an order for sale, liberty was given to either party to bid, some third party in Chambers to have the conduct of the sale (*g*).

A defendant, moreover, the owner of a moiety, was allowed to bid, upon the terms, in the event of his becoming a purchaser, of paying into Court one moiety only of the purchase-money (*h*).

S. 7. "Section 30 of the Trustee Act, 1850, shall extend and apply to cases, where in suits for partition the Court directs a sale instead of a division of the property."

"Trustee Act."—The object of the Legislature in passing this section was to transfer the legal estate, because, independently of s. 30 of the Trustee Act, 1850, wherever the Court had jurisdiction to make a decree for sale, such decree bound in equity the interests of all persons not in existence, and who could not be made parties to the suit (*i*).

Section 1 of the Trustee Act, 1882, repealed by the Trustee Act

(*a*) *Drinkwater v. Radcliffe*, 20 Eq. 528, 532.

(*b*) Partition Act, 1868, s. 3, *supra*, p. 206; Partition Act, 1876, s. 6, p. 220.

(*c*) *Richardson v. Feary*, 39 C. D. 15.

(*d*) *Ibid.*

(*e*) *Gilbert v. Smith*, 11 C. D. p. 82.

(*f*) *Pennington v. Dalbiac*, 18 W. R. 681; not followed in *Verrall v. Cathcart*, 27 W. R. 613.

(*g*) *Roughton v. Gibson*, *infra*.

(*h*) *Wilkinson v. Joberns*, 16 Eq. 11, 18; *cf. Roughton v. Gibson*, 25 W. R. 269.

(*i*) *Basnett v. Moxon*, 20 Eq. 182, 184; *Stanley v. Wrigley*, 3 Sm. & G. 18; *Lees v. Coulton*, 20 Eq. 20. As to the present practice with regard to infants, see *Mellor v. Porter*, p. 205, *supra*, and as to lunatics, *supra*, p. 200, *supra*.

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1893, was held to apply to sales hereunder (a), but see s. 30 of the Trustee Act, 1893.

Where the shares of parties to a partition suit were very minute and complicated, the Court declared each of the parties trustees as to the shares allotted to the other of them, and vested the whole in a single trustee with directions to convey to each of the parties their allotted shares (b).

S. 8. "Sections 23 to 25 (both inclusive) of the Act of the session of the 19th and 20th years of her Majesty's reign (c), 'to facilitate the leases and sales of settled estates,' shall extend and apply to money to be received on any sale effected under the authority of this Act."

Sale out of Court.—Under this section the Court has power to order a sale out of Court and payment of the proceeds to trustees (d). In *Strugnell v. S.* (e) it was held that where some of the parties interested are not *sui juris* and the trustees have no power of sale there is no jurisdiction hereunder to order a sale out of Court (f). This section applies to dealings with all estates, whether settled or not (g).

The Settled Estates Act, 1856, was repealed by the Settled Estates Act, 1877, sections 34 to 36 of which correspond to sections 23 to 25 of the repealed Act.

Conversion.—A judgment for sale in a partition action properly made *converts* the shares of parties not under disability who die before the sale takes place (h), and the conversion takes place from the date of the judgment, and before sale (i).

And where either a married woman or an infant properly requests a sale under section 6 of the Partition Act, 1876 (k), conversion will take place (l); so where a married woman has elected to treat the property as converted (m); and the share of a married woman who

(a) *Beckett v. Sutton*, 19 C. D. 646.

(b) *Shepherd v. Churchill*, 25 B. 21;
Orger v. Sparke, 9 W. R. 180.

(c) Ch. 120.

(d) *Hayward v. Smith*, 20 L. T. R. 70; *Chubb v. Pettipher*, W. N. (1872) p. 110, not followed in *Baker v. B.*; see *Strugnell v. S.*, 28 C. D. 250.

(e) 28 C. D. 259.

(f) And see *Re Harvey's S. E.*, 21 C. D. 123; *Higgs v. Dorkis*, 13 Eq. 280;

Aston v. Moredith, 13 Eq. 492.

(g) *Re Barker*, 17 C. D. 244.

(h) *Steed v. Preece*, 18 Eq. 192;
Arnold v. Dixon, 19 Eq. 113.

(i) *Hyett v. Mekin*, 23 C. D. 735, where the cases are considered.

(k) *Infra*, p. 218.

(l) *Wallace v. Greenwood*, 16 C. D. 362; *Hyett v. Mekin*, *supra*.

(m) *Fowler v. Scott*, 19 W. R. 972.

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elects to treat it as personalty may, with her consent, be paid to her husband (*a*), and where the fund was under 200*l.*, it was paid to her on her separate receipt, without separate examination, on an affidavit of no settlement (*b*).

Where, however, real estate is sold under a judgment on a partition action in the case of *persons under disability*, an equity for reconversion arises by force of this section; this equity is applicable in the case of the share of an infant (*c*), or a married woman who has done nothing to affect her equity (*d*), and also in the case of the share of a person of unsound mind (*e*); and upon their deaths, their shares will be treated as realty (*f*). But if the sale is made at the request of a person duly authorized to make such request on behalf of the person under disability under the 6th section of the Partition Act, 1876 (*infra*, p. 220), the conversion is complete (*g*). If a person *sui juris* becomes entitled as heir-at-law to the share of an infant in lands sold hereunder, he takes it as personal estate (*h*).

S. 9. "Any person who, if this Act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause, the Court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration; but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings, as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings, and any such person may, within a time

(*a*) *Stundering v. Hall*, 11 C. D. 652; *Re Robins*, 27 W. R. 705.

(*b*) *Wallace v. Greenwood*, 16 C. D. 362; cf. *Topham v. Burgoyne*, 41 L. T. 670. The limit is now 500*l.*, *Seton* (1893), p. 789; *Re Morton*, W. N. (74) 181.

(*c*) *Foster v. F.*, 1 C. D. 388.

(*d*) *Mildmay v. Quicke*, 6 C. D. 553; *Re Lloyd*, 9 P. D. 65.

(*e*) *Grimwood v. Bartels*, 25 W. R.

843; *Re Barker*, 17 C. D. 241; *Re Pares*, 12 C. D. 333; *A.-G. v. Ailesbury*, 14 Q. B. D. p. 901; *Re Pickard*, 53 L. T. 293.

(*f*) *Howard v. Jalland*, Web. (1891) 210.

(*g*) *Wallace v. Greenwood*, 16 C. D. 362.

(*h*) *Morlaunt v. Benwell*, 19 C. D. 302.

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limited by general orders, apply to the Court to add to the decree or order."

"Parties, &c."—As to parties to partition actions see *supra* (a).

"Shall be served."—A sale cannot be ordered until all parties are before the Court (b), or have been served with notice of the judgment (c), or unless such service has been dispensed with (d), or unless they are sufficiently represented by their trustees (e), or unless death is presumed (f).

Judgments and Orders (see p. 202).—If all persons interested are parties, and the title is proved at the hearing, a judgment for sale may be then given (g). Where the defendants admit the title, an order may be made directing the usual inquiries as to the persons interested in the property (h); and in *Ripley v. Sawyer* (i) such inquiries were held to be sufficient protection to infants. Or an order for sale may be made conditional on the persons interested being certified as being parties to the action (k). The general rule is, however, to send a reference as to title to Chambers (l).

Where all the parties are not before the Court, a sale can only be ordered at the hearing on further consideration (m), or on certificate as above mentioned.

Inquiries may be directed in a District Registry, but the application for sale should be to the Judge to whom the action is assigned (n).

When in a partition suit a decree is made for sale dependent upon its being found under inquiries thereby directed that it would be

(a) Note "Parties," p. 201.

(b) *Mildmay v. Quicke*, 20 Eq. 537; *Dodd v. Gronow*, 17 W. R. 511.

(c) See R. S. C. 1883, Order 16, r. 40.

(d) See Partition Act, 1876, s. 3, *infra*; R. S. C. 1883, O. 53, rr. 35, 35A; *Phillips v. Andrews*, 56 L. T. 108.

(e) See *Goodrich v. Marsh*, W. N. (1878) 186; R. S. C. 1883, O. 16, r. 8; *Stace v. Gage*, 8 C. D. 451.

(f) *Jackson v. Lomas*, 23 W. R. 744; *Rawlinson v. Miller*, 1 C. D. 52.

(g) *Mildmay v. Quicke*, 20 Eq. 538; *Loes v. Coulton*, 20 Eq. 20; *Powell v. P.*, 10 Ch. 130; *Rawlinson v. Miller*,

1 C. D. 52; *Gilbert v. Smith*, 2 C. D. 686; *Burnell v. B.*, 11 C. D. 213; *Dodds v. Gronow*, 17 W. R. 511; *Re Stedman*, 58 L. T. 709; *Wood v. Gregory*, 43 C. D. 82; *Hawkins v. Herbert*, 60 L. T. 142.

(h) *Gilbert v. Smith*, 2 C. D. 686.

(i) 31 C. D. 494; *cf.* *Willis v. W.*, 38 W. R. 7.

(k) *Senior v. Hereford*, 4 C. D. 495; *Scott v. Watson*, Seton (1893), p. 1533; *cf.* *Sykes v. Scholfield*, 14 C. D. 629.

(l) *Hawkins v. Herbert*, *supra*.

(m) *Mildmay v. Quicke*, *supra*.

(n) *Sykes v. Scholfield*, 14 C. D. 629.

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more beneficial than a partition, and that all parties entitled were parties to the suit, *if a sale takes place before the certificate is made*, the purchaser is entitled to be discharged, although a certificate may be afterwards made, finding that the proper parties are before the Court, and that a sale is beneficial (*a*). But where all the parties interested are in fact before the Court at the hearing, and are willing to convey, and a good title can be made independently of the Partition Act, 1868, the purchaser is bound to accept such title, and cannot rely upon a technical informality in the decree (*b*). The Court in ordering a sale at the request of the parties to the action, will not in the absence of the other parties interested, preface the judgment order for sale with an expression of its opinion that a sale is more beneficial than a partition (*c*).

"On further consideration."—These words are to be taken in a popular sense as referring to any consideration the cause receives after the inquiries have been made (*d*).

And in a judgment on a trial of a partition action, an inquiry as to incumbrances may be directed, as that would assist in clearing the title (*e*).

The Court has power to direct a sale in chambers by auction before the chief clerk, or by an auctioneer (*f*), or may confirm a conditional contract for sale entered into between the parties (*g*).

It may also make an order for partition instead of sale (*h*), even in opposition to the chief clerk's certificate (*i*), or for partition of part and sale of the rest (*k*). The Court has refused to order a sale reserving the minerals (*l*), but it will bar the estate of a lunatic for the purposes of a sale (*m*).

Liberty may be given to the parties to bid at the sale, and to set off part of the purchase-money against their respective shares, and they will be charged interest thereon at the rate of 3 per cent. (*n*).

(*a*) *Powell v. P.*, 10 Ch. 130.

(*b*) *Rawlinson v. Miller*, 1 C. D. 32;
Cavendish v. C., 10 Ch. 319.

(*c*) *Re Hardiman*, 16 C. D. 360;
Waite v. Bingley, 21 C. D. 674.

(*d*) *Powell v. P.*, 10 Ch. 130, 134;
Mildmay v. Quicke, 20 Eq. 537.

(*e*) *Soton* (1893), Form 3, p. 1534.

(*f*) *Pemberton v. Barnes*, 13 Eq.
349.

(*g*) *Grove v. Comyn*, 18 Eq. 387.

(*h*) *Dicks v. Batton*, W. N. (1870)
p. 173.

(*i*) *Allen v. A.*, 21 W. R. 842.

(*k*) *Roebeck v. Chadebet*, 8 Eq. 127;
Pennington v. Dalbiac, 18 W. R. 681.

(*l*) *Lowe v. Stoney*, W. N. (1876)
p. 141.

(*m*) *Re Pares*, 12 C. D. 333.

(*n*) *Re Dracup*, (1894) 1 Ch. 59.

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And by R. S. C. 1883, Order 51, r. 1A, in cases where a partition is ordered, a Judge has power, in addition to the powers already existing, with a view to avoiding expense or delay, or for other good reason, to authorize the same to be carried out, either by laying proposals before the Judge in Chambers for his sanction; or by proceedings altogether out of Court, any moneys produced thereby being paid into Court or to trustees, or dealt with as the Judge may order. But the Judge is not to authorize proceedings altogether out of the Court, unless he is satisfied, that all persons interested in the estate to be sold are before the Court or are bound by the order for sale. And every order authorizing proceedings, altogether out of Court, is to be prefaced by a declaration that the Judge is so satisfied, and by a statement of the evidence upon which such declaration is made (a).

"Notice of Decree."—See Partition Act, 1876, s. 3, *infra*, p. 218.

S. 10. "In a suit for partition, the Court may make such order as it thinks just respecting costs up to the time of the hearing."

"Costs."—The old practice as to costs is stated *supra* (b).

In a suit for sale under this Act, where the plaintiffs were owners of one moiety and the defendants of one fourth of the estate, and the owners of the remaining fourth were served with notice of the decree, it was held that the costs of all parties ought to be paid out of the estate, and *Selborne, C.* said that, having regard to this section, it could not be said that the Court was bound by the old rule as to costs of partition suits. That it was impossible to lay down a general rule on the subject, that there might be cases in which the Court, in the exercise of its discretion, would follow the old practice (c).

It is now settled practice to allow the costs of all necessary parties in an action for partition or sale, out of the entire estate or out of the entire proceeds of sale on the broad principle that the costs properly incurred with the view of partition or realization are incurred on behalf of all. The costs of each share would thus be borne by the estate, a rule which generally speaking works fairly (d).

(a) See Annual Practice (1895), p. 927, and the notes thereto; *Willis v. W.*, 61 L. T. 610; *Crook v. C.*, W. N. (1890) 26; *Re Stedman*, 58 L. T. 709; and for a form of order for sale out of Court, see *Pitt v. White*, 57 L. T. 650.

(b) *Per Eldon, C.*, p. 193.

(c) *Simpson v. Ritchie*, 16 Eq. 103; *Osborn v. O.*, 6 Eq. 338; *Miller v. Marriott*, 7 Eq. 1; *Leach v. Westall*, 17 W. R. 313.

(d) *Belcher v. Williams*, 45 C. D.

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But the Court has a discretion (*a*), and the rule may be departed from under special circumstances (*b*). For instance, a defendant who improperly disputed the plaintiff's title, has been ordered to pay so much of the costs as he thereby occasioned (*c*), and the costs occasioned by adverse litigation between the parties interested in any share will, to some extent at any rate, have to be borne by that share and not by the estate generally (*d*).

North, J. in *Belcher v. Williams* (*e*), thought the "shares" ought to be taken as they were ascertained at the time when the chief clerk's certificate was made, but *Kekewich, J.* in *Cotton v. Banks* (*f*), thought otherwise.

As to the costs of incumbrancers, if they are not parties and are not entitled to appear, then they will get no costs (*g*). If they are entitled to appear, then they will as a general rule get their costs out of the estate (*h*). But *Kekewich, J.*, held in *Cotton v. Banks*, *supra*, that only one set of costs should be allowed in respect of the share mortgaged. Thus in *Cotton v. Banks* there were three shares, of which one was incumbered, the second had two mortgages upon it, and the third one. *Kekewich, J.*, held that there should be three sets of costs only, one for each share, whereas if the rule in *Belcher v. Williams* had been followed, there would have been six sets of costs.

As to the costs of trustees, see *Herring v. Oliver* (*k*). The costs of infants (*l*), or of a lunatic (*m*), may be charged upon and ordered to be raised out of the shares allotted to them.

S. 11. This section gave power to make general orders under the Act (*n*).

p. 513; *Cotton v. Banks*, (1893) 2 Ch. p. 224; also *Cannon v. Johnson*, 11 Eq. 90; *Thompson v. Richardson*, 6 Eq. 396; *Ball v. Kemp-Welch*, 14 C. D. 512; *Osborn v. O.*, 6 Eq. 338; *Miller v. Marriott*, 7 Eq. 1; *Simpson v. Ritchie*, 16 Eq. 103.

(*a*) Sect. 10 of the Act, R. S. C. 1883, Order 65, r. 1; *Judicature Act*, 1890, s. 5; *Annual Practice* (1895), p. 146 and note.

(*b*) *Wilkinson v. Joberns*, 16 Eq. 14; *Porter v. Lopes*, 7 C. D. 367; *Wilkinson v. Castle*, 16 W. R. 501.

(*c*) *Hill v. Falbrook*, Jac. 574; *Wilkinson v. Castle*, 16 W. R. 501; *Morris v. Timmins*, 1 B. 411, 418.

(*d*) *Mildmay v. Quicke*, 46 L. J. Ch.

667; *Jennings v. Foster*, W. N. (1884) 200; *Hawkes v. H.*, 63 L. T. 488; *Belcher v. Williams*, 45 C. D. p. 514.

(*e*) 45 C. D. p. 515. *Ancell v. Rolfe*, 40 Sol. Jo. 230.

(*f*) (1893) 2 Ch. p. 226; see *Ancell v. Rolfe*, *supra*.

(*g*) *Mildmay v. Quicke*, 46 L. J. Ch. 667, 669.

(*h*) *Belcher v. Williams*, *supra* but see *Ancell v. Rolfe*, *supra*.

(*k*) 37 L. T. 229.

(*l*) *Cox v. C.*, 3 Kay & J. 544.

(*m*) *Singleton v. Hopkins*, 4 W. R. 107.

(*n*) See *Judicature Act*, 1881, s. 19; *Annual Practice* (1896), (n.) "Rule Committee."

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S. 12. "In England, the County Courts shall have and exercise the like power and authority as the Court of Chancery in suits of partition (including the power and authority conferred by this Act), in any case where the property to which the suit relates does not exceed in value the sum of 500*l.*, and the same shall be had and exercised in like manner, and subject to the like provisions as the power and authority conferred by s. 1 of the County Courts Act, 1865."

"County Courts."—See County Courts Act, 1888, and as to the transfer of actions to the Chancery Division, s. 68 thereof, and *Rowlinson v. Miller* (a), where the proceeds of sale exceeded 500*l.*

Chancery of Lancaster.—See Chancery of Lancaster Act, 1890, s. 3.

The Partition Act, 1876 (39 & 40 Vict. c. 17).

S. 3. "Where in an action for partition it appears to the Court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is, by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the Court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and, instead thereof may direct advertisements to be published at such times and in such manner as the Court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before a judge in Chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the Court (including persons under any disability) shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with, and thereupon the powers of the Court under the Trustee Act 1850, shall extend to their interests in the property to which the action relates, as if they had been parties to the action; and the Court may thereupon, if it shall think fit, direct a sale of the property, and give all necessary or proper consequential directions."

(a) 1 C. D. 52.

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"May . . . dispense."—For form of order giving liberty to apply for service being dispensed with see below (a).

"Advertisements."—If service is dispensed with, advertisements must be issued (b). But if the persons with regard to whom service is dispensed with have no beneficial interest, advertisements will not be necessary (c).

S. 4. "Where an order is made under this Act dispensing with service of notice on any person or class of persons, and property is sold by order of the Court, the following provisions shall have effect:—

- (1) The proceeds of sale shall be paid into Court to abide the further order of the Court.
- (2) The Court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may, from time to time, by further order extend that time.
- (3) The Court shall direct such notices to be given by advertisements or otherwise, as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made.

"Advertisements."—See this note to s. 3, *supra*.

- (4) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the Court shall distribute the proceeds in accordance with the rights of those persons.
- (5) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the Court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the Court shall distribute the proceeds in such manner as appears to the Court to be most in accordance with the rights of the

(a) Seton (1893), Form 8, p. 1336; 944; Phillips v. Andrews, 56 L. T. R. S. C. 1883, Order 35, rr. 35, 35A; 108; and see s. 4, s. 3, *supra*.
Annual Practice (1896), Part II. (c) Crossman v. Richards, W. N. (1888) 167.

(b) Hacking v. Whalley, 31 L. J. Ch.

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persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the Court, and with such reservations (if any) as to the Court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the Court to have any *prima facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this Act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person."

S. 5. "Where in an action for partition two or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time."

S. 6. "In an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy, (if so authorised by order in lunacy), or other person authorised to act on behalf of the person under such disability; but the Court shall not be bound to comply with any such request or undertaking on the part of an infant, unless it appear that the sale or purchase will be for his benefit" (a).

"Married Woman, Infant, &c."—The request for a sale by a married woman should be made by a writing signed by her authorizing and requesting her solicitor to ask for a sale (b). The

(a) This section only applies to cases within the Partition Act, 1868, s. 3; (b) *Wallace v. Greenwood*, 16 C. D. 362; *Grange v. White*, 18 C. D. 612. *Miles v. Jarvis*, 50 L. T. 48.

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request of an infant may be by his guardian *ad litem* (a). Persons of unsound mind and lunatics may bring an action for partition by their next friend (b).

S. 7. "For the purposes of the Partition Act, 1868, and of this Act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition."

6. Other Jurisdiction in Partition.

Inclosure Acts.—With regard to the jurisdiction of the Inclosure Commissioners, now the Board of Agriculture, as to partition see below (c).

Incumbered Estates Act, Ireland.—By this Act, power was given to the commissioners to make partition (d).

Settled Land Act.—As to the power of a tenant for life to concur in making partition of lands see below (e).

Dower.—Upon the same principle as in cases of partition, although dower was originally a mere legal demand, a widow being a joint owner became entitled in equity to an assignment of one-third of the lands of which her husband was seised in fee or in tail, which her issue might by possibility have inherited, as her dower. The difficulty of proceeding at law, together, probably, with the necessity of obtaining a discovery from the heir, devisees, or trustees, gave equity a concurrent jurisdiction with the old Courts of law, which, it seems, would have been exercised without its being shown whether such difficulty actually existed or not.

(a) *Rimington v. Hartley*, 14 C. D. 690; cf. *Howard v. Jalland*, W. N. (1891) 210; *Soton* (1893), p. 1543.

(b) *Porter v. P.*, 37 C. D. 420, *supra*. As to lunatics, see Lunacy Act, 1890, s. 120 (b).

(c) See 8 & 9 Vict. c. 118, ss. 90, 91; 11 & 12 Vict. c. 99, ss. 13, 14; 12 & 13 Vict. c. 83, ss. 7, 11; 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c. 97,

s. 5; 20 & 21 Vict. c. 31, ss. 7—11; 22 & 23 Vict. c. 43, ss. 10, 11; 39 & 40 Vict. c. 56, s. 33; the Board of Agriculture Act, 1889; Chitty's Statutes (Lely), title "Inclosure"; *Soton* (1893), p. 1570; and cf. *Jacomb v. Turner*, (1892) 1 Q. B. 47.

(d) *Re Wilkins*, 4 Ir. Ch. R. 575.

(e) See the Settled Land Act, 1882, ss. 3, 4, 31, 45.

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For an able exposition of the law of dower, see the judgment of *Alvanley, M.R.*, in the leading case of *Curtis v. C.* (a).

Widows, before the Dower Act (b), were only dowable out of legal estates: but by that Act every woman married after the 1st Jan., 1834, is dowable out of her husband's equitable estates of inheritance. The Act, however, has put her right to dower entirely in the hands of her husband, who may defeat it wholly or partly.

Formerly, if the widow's right to dower were disputed, an issue was directed (c); or the bill retained for a certain time, with liberty to the widow to bring a writ of dower (d). But a writ may now be indorsed with a claim for dower (e).

The right being established, and the property out of which the widow is dowable being ascertained, the next step is to ascertain the dower; and this may be done either by a reference (f), or by directing a commission to issue, which is made out, executed, and returned in the same manner as a commission of partition (g).

As a general rule, on a bill to assign dower, no costs were given on either side (h). But if the defendant added another case, as by disputing the title of the widow, denying the marriage, or the seisin of the husband, or set up any other ground of defence in which he failed, he might be liable to pay the costs of the suit occasioned by that unsuccessful defence (i).

(a) 2 Bro. Ch. 620; and see *Mundy v. M.*, 2 V. jun. 122; *Pulteney v. Warren*, 6 V. 89; *Strickland v. S.*, 6 B. 77, 81.

(b) 3 & 4 Will. 4, c. 105; *Shelford*, R. P. Statutes (1893), p. 339.

(c) *Mundy v. M.*, 2 V. jun. 122; see also R. S. C. Order 33, r. 1, and notes *Annual Practice* (1893), p. 659.

(d) *Curtis v. C.*, 2 Bro. Ch. 620; *D'Arcy v. Blake*, 2 Sch. & L. 390.

(e) R. S. C. 1883, App. A, Pt. 3, s. 4.

(f) *Goodenough v. G.*, 2 Dick. 795; *Seton* (1893), Form 1, p. 805.

(g) *Wild v. Wells*, 1 Dick. 3; *Huddleston v. H.*, 1 Ch. Rep. 38; *Lucas v. Calcraft*, 1 Bro. Ch. 133, 2 Dick. 594; *Mundy v. M.*, 2 V. jun. 125, 4 Bro. Ch. 294; *Seton* (1893), Form 2, p. 806; R. S. C. 1883, App. K, 36; App. J, 13.

(h) *Lucas v. Calcraft*, *Mundy v. M.*, *supra*.

(i) *Bamford v. B.*, 5 Ha. 205; *Fry v. Noble*, 20 B. 598, 606; *Harris v. H.*, 11 W. R. (M.R.) 62; *Williams v. Gwyn*, 2 Wins. Saund. 45 (n.); and see further *Seton* (1893), p. 807.

COMPROMISES.

STAPILTON *v.* STAPILTON.

1739. 1 Atk. 2.

Compromise—Family Arrangement.

An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties ; for the right must always be on one side or the other ; and, therefore, the compromise of a doubtful right is a sufficient foundation of an agreement.

Where agreements are entered into to save the honour of a family, and are reasonable ones, a Court of equity will, if possible, decree a performance of them.

By a deed, dated on the 21st of August, 1661, Philip Stapilton was tenant of the premises in question, for ninety-nine years, if he so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip having two sons, Henry and Philip, they, by deeds of lease and release, the 9th and 10th of September, 1724, reciting, that for settling and perpetuating all manors, &c., in the name and blood of the Stapiltons, and for making provision for his two sons &c. for preventing disputes and controversies that might possibly arise between the said two sons, or any other person claiming an interest in all or any of the estates thereinafter mentioned, and for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum of 5s. did release and confirm to Thomson and Fairfax all those manors &c. To have and to hold to them, their heirs and assigns, to the use as to part of Philip the father, his heirs and assigns for ever, and as to

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another part, to the use of Philip the father for life, remainder to Henry the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to Philip the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of Henry in tail, remainder to the daughters of Philip the son in tail, remainder to the right heirs of Philip the father. And as to the remaining part, to the use of Philip the father for life, with like limitations in the first place to Philip the son and his issue, and then to Henry and his issue, remainder in fee to the father.

There were covenants to suffer a recovery within twelve months and likewise for farther assurances. N.B. To this deed, the heir of the surviving trustee in the deed in 1661 was not a party.

But, by deeds of lease and release, dated the 28th and 29th of September, 1724, to which the heir of the surviving trustee of the deed of 1661 was a party, the father and two sons make Thomson and Fairfax tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deeds of the 9th and 10th of September, 1724.

Before any recovery suffered, Henry died, leaving issue the plaintiff.

Afterwards, by lease and release, the 12th and 13th of April, 1725, to which the heir of the surviving trustee of the deed of 1661 was a party, Philip the father and Philip the son covenant to suffer a recovery, in which Thomson and Fairfax were to be tenants to the præcipe, to the use, as to part, of Philip the father, his heirs and assigns; and as to the other part, to the use of Philip the father for life, remainder to Philip the son in fee.

In Trinity Term, 1725, a recovery was suffered, in which were the same tenant to the præcipe, the same demandant, and the same vouches (except Henry, who was dead), as were covenanted to be by the first deed, it was likewise suffered within twelve months after the first deed.

The father Philip Stapilton, being dead, the plaintiff, as son and heir of Henry, brought this bill to establish his title to the premises in question, and for the whole estate as tenant in tail under the old settlement, and to be let into possession, and for an account of rents

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received by Philip Stapilton the son, due since the death of the plaintiff's grandfather, and to have the same applied for the plaintiff's benefit during his infancy, and for an injunction to restrain the defendants from receiving any more rents.

The defendant Philip the son, by his answer confesses the several deeds before mentioned, but says, Henry was a bastard, and that, by virtue of the deed of 1725, and of the recovery, he was entitled to the whole estate in question.

Upon an issue directed, Henry was found illegitimate, and the cause was now heard upon the equity reserved, when the counsel for the plaintiff, waiving the claim to the whole estate, insisted upon these two points:—

Argument for the plaintiff.—1st. That the recovery suffered in Trinity Term, 1725, should enure to the use of the deeds of the 9th and 10th of September, 1724, and not to the uses of the deed in 1725.

2ndly. Supposing it did not, yet that the deed of 1724 was such an agreement as this Court will carry into execution.

As to the first point, it was said that the uses, when once declared, cannot be altered, unless all the parties entitled to the uses join in the new declaration: and Henry did not join in the deed of 1725.

* * *

As to the second point: this cannot be considered as a voluntary agreement, for Henry's legitimacy was then doubtful, and, if he had proved legitimate, Philip would have come into this Court to have the agreement executed, and Henry would have been bound by it. This Court has decreed the performance of agreements like this founded upon mistakes, as in the cases of *Fenak v. Fenak* (a) and *Cann v. Cann* (b).

Argument for the defendant.—For the defendant it was argued as to the first point, that Henry being dead before the recovery was suffered, the intent of the parties in the first deed could not be pursued; for the plaintiff (supposing him legitimate) claims paramount his father, and the deed of 1661: therefore as the recovery could not substantiate the first deed, supposing him legitimate, it shall not substantiate it now he is found illegitimate * * *

(a) 1 Ch. Ca. 84.

(b) 1 P. W. 723.

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As to the second point : take it as an agreement, this Court will not decree a performance of it ; for, supposing Henry had been found legitimate, this Court would not have decreed a performance of it against the plaintiff ; so that, in regard to the defendant, it must be considered as a voluntary agreement, into which he was drawn without any valuable consideration ; and the covenant for further assurance will be void, as the deed itself to which it is annexed is void : and so it was determined in the case of *Fursaker v. Robinson* (a).

LORD CHANCELLOR HARDWICKE.—The plaintiff in this case is entitled to have a decree. There was a sufficient foundation for Philip the father, and Henry and Philip, his two sons, to execute the lease and release of the 9th and 10th of September, 1724. It was *to save the honour of the father and his family, and was a reasonable agreement ; and, therefore, if it is possible for a court of equity to decree a performance of it, it ought to be done.*

It would be very hard for the defendant, on his side, to endeavour to set aside this agreement, and the effect of this deed. Consider the state and situation of the family at the time of making the agreement ; Philip had these children grown up, had a very considerable real estate, both his sons then owned as legitimate, their father and mother had lived together as husband and wife for many years, and at the time of this agreement were so ; there was a foresight in the father and mother that such a dispute between their two sons might hereafter arise, to their dishonour, and likewise that of the family.

The foundation of this agreement, the illegitimacy of the eldest son Henry, has now been determined by a trial, and it is found that Henry was a bastard ; yet both the sons are of the same blood of the father equally, though not so in the notion of the law.

If the elder son should be found illegitimate (as he now is), the father knew he would be left without any provision, if no such agreement was made ; and, on the other hand, if his legitimacy should be established, then Philip, the younger son, would have nothing. To prevent these disputes and ill consequences, the father brings both his sons into an agreement to make a division of his real estate. It is very plain the parties did not know who was the heir of the surviving

(a) Pr. Ch. 475.

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trustee in the settlement of 1661, at the time of the lease and release of the 9th and 10th of September, 1724; because they covenant a writ of entry should be sued out within twelve months, which is a very unusual time to limit to suffer a recovery, and done in order to give time to find out the heir of the surviving trustee, if they could find him out; but he was afterwards found, and made a party to the deeds of the 28th and 29th of September, 1724.

The bill is brought by the eldest son and heir of Henry, to have the benefit and possession of the whole estate, and to have an account of the rents and profits, and to be quieted in the possession, and for general relief. Upon the first hearing, an issue was directed to try whether Henry the father was legitimate, and it was found he was not: and now the plaintiff insists upon having the benefit of this agreement, whereby he is only entitled to a part; this being the bill of an infant, he may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned and insisted upon it, and prayed it by his bill; but it might be otherwise in the case of an adult person.

Upon this case there arise two general questions:—

First, Whether the plaintiff has any estate at law by virtue of any of the conveyances, or by the recovery?

Secondly, If he has no estate at law, or only a defeasible one, whether he is entitled to have the benefit of this agreement, and to have it carried into execution here?

The first question consists of two branches:—

First, Whether the lease and release of the 9th and 10th of September, 1724, will amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April, 1725?

Secondly, If not, whether the recovery of Trinity Term, 1725, having barred the estate tail, will make good any estate which passed by the lease and release of the 9th and 10th of September, 1724? (Both of these questions were decided by the Chancellor in the affirmative, upon grounds depending upon the law of Recoveries and the Statute of Uses. So much of the judgment as relates thereto is now omitted.)

* * * * It has been objected, that, if the plaintiff has any title, his remedy is at law; but I think it is more properly here. He is an infant, and has come recently into this Court. Nor do I think

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this case depends entirely upon the point of law ; for I am of opinion that the plaintiff is entitled to have an execution of the agreement as a good and binding agreement in this Court.

The question is, whether there was *any valuable consideration* on all sides for entering into this agreement ? If so, then there is a sufficient ground for coming here ; but a mere volunteer is not entitled to come here for an execution of an agreement. But here is a proper consideration, as appears in the recital of the deed of 1724. Neither is it the common case of a bastard ; for the law of England does allow of some privileges to a bastard eigne, and their parents are not punishable by the canon law for antenuptial fornication.

In the case of *Cann v. Cann* (a), it was laid down by Lord *Macclesfield*, that an agreement, entered into upon a supposition of a right (b), or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties ; for the right must always be on one side or the other ; and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.

Another objection has been made to this agreement, that the benefit on Henry and Philip's side was not mutual and equal. During both their lives, the benefit and obligation was mutual, and Henry would have been equally compellable to suffer a recovery with Philip. But it is said, that an alteration as to their mutual benefit has happened by the death of Henry ; and it is said, that if Henry had been legitimate, the plaintiff would not have been compellable to suffer a recovery, because the issue in tail is not compellable to perform the covenants of his ancestor, the tenant in tail. But here, the chance was at first equal ; and it is hard to say, that the act of God should hinder the agreement from being carried into execution ; the chance was equal, who died first, Henry or Philip ? If Henry had been legitimate, and Philip had died in Henry's life, leaving children, I am of opinion Philip's son would have been entitled to have come against Henry for an execution of the agreement ; and, therefore, the

(a) 1 P. W. 723, 727.

(b) Lord *Eldon* in *Stockley v. S.*, 1 V. & B. 31, 12 R. R., p. 159, observes that the words of Lord *Maccles-*

field, instead of "a supposition of right," might have been "a doubtful right."

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chance was at first equal on both sides, and we are not to consider how the event has happened.

Another objection has been taken, that the father made use of his coercive power over Philip, to force him into this agreement; and it is said equity does not favour agreements made by compulsion. But *this Court always considers the reasonableness of the agreement*; besides, here is no proof of compulsion by the father: if there was any compulsion, it seems rather to have been made use of against Henry, who was then esteemed his eldest son; and, considering the consequence of setting aside this agreement, *a Court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family.*

His Lordship, therefore, declared, that the plaintiff is entitled to the lands and premises limited in remainder, to the first son of Henry Stapilton, his father, by the deeds of the 9th and 10th of September, 1724, according to the uses therein, and to the benefit of the covenants in those deeds, and decreed the defendant Philip to come to an account for the rents of the said premises; and declared that Philip was entitled to hold the lands, limited by the deeds of the 9th and 10th of September, 1724, to Philip the elder for life, with remainder to the defendant for life, against the plaintiff and his heirs; and that the defendant should make further assurance to the plaintiff of his part, and the plaintiff the like assurance to the defendant of his part, and no costs on either side.

NOTES.

1. Compromises.

2. Family Arrangements, p. 242.

1. Compromises.

The compromise of doubtful claims, whatever may be the actual rights of the parties, has, from the policy of preventing litigation, been generally upheld in all enlightened systems of jurisprudence. The authorities of the civil law upon the subject are collected in Burge's Comm. vol. 3, 742. So, in the law of Scotland, compromises, under the name of *transactions*, are equally favoured (a).

(a) Stair's Inst. tit. 7, s. 9; Hotchkin v. Dickson, 2 Bli. 348; Stewart v. S., 6 Cl. & Fin. 911; and see Trigge

v. Lavallée, 11 W. R. 404, as to the old French law.

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With regard to our law, it is clear that if a person, after due deliberation, enter into an agreement for the purpose of compromising a claim made *bonâ fide*, to which he believed himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and a Court of equity, without inquiring whether he was in truth liable to the claim, will compel a specific performance (a). The Court will enforce specifically private compromises of rights, in the same way in which it will enforce other contracts (b). This supposes the existence of a concluded agreement, made between persons capable of contracting, for adequate consideration (c), with full knowledge (d), and without pressure (e), and which might at the time it was entered into have been enforced by either of the parties against the other of them (f).

The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim (g).

"In dealing with a compromise, always supposing it to be a thing that is within the power of each party if honestly done, all that a Court of justice has to do is to ascertain that the claim or the representation on the one side is *bonâ fide* and truly made, and that on the other side the answer or defence or counterclaim is also *bonâ fide* and truly made. I mean by *bonâ fides* the truth of the parties, and above all this that the compromise is not a sham, or an instrument to accomplish or to carry into effect any ulterior or collateral purpose, but that the thing sought to be done is within the very terms of the compromise—that all that the parties contemplate and desire to effect and to deal with is whether the claim on the one side or the defence on the other side shall be admitted or not: or whether if both things are *bonâ fide* brought forward there may not be some concession on the one side and some concession on the other side, so

(a) *Attwood v. —*, 1 Russ. 353; *Pickering v. P.*, 2 B. 56; *Partridge v. Smith*, 11 W. R. 714; *Miles v. New Zealand, &c. Co.*, 32 C. D. 266.

(b) *Fry, Sp. Performance* (1892), ch. 7, p. 695.

(c) *Cf. Naylor v. Winch*, 1 S. & S. 565; *Lucy's case*, 4 De G. M. & G. 356; *Cook v. Wright*, 1 B. & S. 559, 570; *Miles v. New Zealand, &c. Co.*, 32 C. D. 266.

(d) *Pusey v. Desbouverie*, 3 P. W. 315; *Smith v. Pincombe*, 3 Mac. & G. 653.

(e) See *Huguenin v. Baseley*, and note, *supra*.

(f) *Cf. Williams v. W.*, 2 Ch. 294.

(g) *Pollock, Contracts*, 1894, p. 180, citing *Trigge v. Lavallée*, 15 Moo. P. C. 271, 292; *Wilby v. Elgee*, L. R. 10 C. P. 497.

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as to arrive at terms of agreement, which, if honestly made, is an honest settlement of an existing dispute. This is the characteristic of a compromise, and if it be not manifestly *ultra vires* of the parties, it is one that a Court of Justice ought to respect and ought not to permit it to be questioned" (a).

A *bona fide* compromise of a real claim—that is, a *bona fide* claim not frivolous or vexatious—is good consideration, whether the claim would have been successful or not (b). If a person believes as a fact that money is due to him for instance, then his claim is honest, and the compromise of that claim will be binding and will form a good consideration, although, if prosecuted, it might be defeated (c).

A distinction has been taken between an error of law and an error of fact. "It is a maxim of equity," says an eminent Judge, "that parties making a mistake in matters of fact shall not be held bound by acts committed by them under such mistake (d). When, however, they make a mistake in law, they cannot afterwards be heard to say that the contract shall on that account be set aside" (e).

But in equity the line between mistakes in law and mistakes in fact has not been (at any rate of recent years) so clearly and sharply drawn (f). Private rights are matters of fact, and if parties contract under a mutual mistake as to their relative and respective rights, the result is that that agreement is liable *to be set aside*, as having proceeded upon a common mistake (g). But, *quære* whether the common

(a) Per Lord Westbury in *Dixon v. Evans*, 5 L. R. H. L., p. 619.

(b) *Miles v. New Zealand, &c. Co.*, 32 C. D. 266, where *Callisher v. Bischoffshelm*, 5 L. R. Q. B. 449, which was doubted by Brett, L.J., in *Ex p. Banner*, 17 C. D., p. 489, was approved by the C. A.

(c) *Cook v. Wright*, 1 B. & S. 539. See judgment of Lord Blackburn, cited with approval by Cotton, L.J., in *Miles v. New Zealand, &c. Co.*, *supra*, and see *Ockford v. Barelli*, 20 W. R. 116.

(d) See *The Monarch*, 12 P. D., p. 7; *Huddersfield Banking Co. v. Lister*, (1895) 2 Ch., p. 284.

(e) *Marshall v. Collett*, 1 Y. & C. Exch. Ca. 238; *Broughton v. Hutt*, 3 De G. & J. 501; *Cooper v. Phibbs*,

2 L. R. H. L., p. 170; *The Midland, &c. R. Co. of Ireland v. Kinder*, 6 W. R. 511; *Beauchamp v. Winn*, 6 L. R. H. L. 223; *Daniell v. Sinclair*, 6 App. Cas. 181, 190; *The Directors, &c. of the Midland, &c. R. Co. of Ireland v. Johnson*, 6 H. L. Cas. 798, 811.

(f) *Daniell v. Sinclair*, 6 L. R. H. L., p. 190.

(g) See judgment of Lord Westbury in *Cooper v. Phibbs*, 2 L. R. H. L. 170; *Stone v. Godfrey*, 5 De G. M. & G. 76; *McCarthy v. Decaix*, 2 Russ. & M. 614, disapproved on another point in *Harvey v. Farnie*, 8 L. R. H. L., p. 52; *Laysey v. L.*, 3 Russ. 287; and cf. *Stewart v. S.*, 6 Cl. & Fin. 966.

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error of both parties or the sole error of the defendant (*a*) would be a ground for resisting specific performance (*b*).

It has been laid down that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his property to another under the name of a compromise, equity will relieve him from the effect of his mistake (*c*). But this statement is not very intelligible or easy of application, for the question remains, what is a plain and settled principle of law? (*d*). Questions on the construction of wills may depend upon principles which in the opinion of some competent persons are quite plain, but it seems clear that a compromise in respect of such instruments will be upheld, although in the result the opinion upon which the compromise was based turns out to be wrong (*e*). And it will be generally found that the cases in which relief has been given in consideration of a mere mistake of law have turned upon an admixture of other ingredients, such as misrepresentation, imposition, undue influence, imbecility, or surprise. And it may be stated generally that ignorance of the law, with a full knowledge of the facts and unattended by any of such circumstances, will furnish no ground for the interposition of a Court of equity, the present disposition of the Courts being to narrow rather than to enlarge the operation of the above cases (*f*). But where the result of denying relief will be to give to the other parties an unconscionable advantage, and the mistake is admitted or proved, equity will give relief, provided the parties can be placed in the same position as if the mistake had not occurred (*g*). But the Court must

(*a*) See *Hart v. H.*, 18 C. D. 671.

(*b*) See *Fry, Sp. Performance* (1892), §§ 763, 804, citing *Tamplin v. James*, 15 C. D., p. 217; and *Powell v. Smith*, 14 Eq. 85.

(*c*) *Naylor v. Winch*, 1 Si. & St. 555; *Leonard v. L.*, 2 Ball & B. 180; *Dunnage v. White*, 1 Swans. 137; *Ramsden v. Hylton*, 2 V. 304; *Turner v. T.*, 2 Rep. Ch. 81; *Bingham v. B.*, 1 V. 126; explained in *Stewart v. S.*, 6 Cl. & Fin. 968; followed in *Cooper v. Phibbs*, 2 L. R. H. L. 150; *Lansdowne v. L.*, 3 Mos. 364; 2 J. & W. 205; doubted in *Stewart v. S.*, 6 Cl. & Fin. 966. In the following cases relief was refused and the compromise enforced: *Worrall v. Jacobs*, 3 Mer.

195; *Pullen v. Ready*, 2 Atk. 587 and *infra*; *Stockley v. S.*, 1 V. & B. 30; *Persse v. P.*, 1 West. 110; *Cann v. C.*, 1 P. W. 727; *Heap v. Tonge*, 9 Ha. 90; *Mildmay v. Hungerford*, 2 Vern. 243.

(*d*) See *Story, Eq. Jur.* (1892), § 127.

(*e*) See *Pullen v. Ready*, 2 Atk. 587, *infra*, p. 234; *Naylor v. Winch*, *supra*; *Pickering v. P.*, 2 B. 31, 56.

(*f*) See *Story, Eq. Jur.* (1892), § 138, and *passim*, citing *Stewart v. S.*, 6 Cl. & Fin. 694 to 971; *Kelly v. Solari*, 9 M. & W. 54, 57, 58; *G. W. R. Co.*, 5 Ha. 91.

(*g*) *Story, Eq. Jur.* (1892), § 138 (*c*) (*d*) and (*e*).

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be satisfied that the conduct of the parties has been determined by mistake (*a*). For further information upon this very difficult point the reader is referred to the works mentioned below (*b*). On the whole it would seem that where the contract between the parties is to settle a *doubtful* right or question, whether it be of law or fact, by a give and take arrangement between themselves, such agreement will be upheld. But that where there is a common mistake of fact or of the law as to private rights which goes to the very root of the matter, so as to prevent any real agreement from being formed, relief will be given (*c*).

The following cases relating to mistake were also of the nature of family arrangements, which are said to be especially favoured in equity (*d*). Yet it is not clear that in the several cases which have come before the Courts the decisions would have been different if the parties had not been members of the same family (*e*). But in some old cases it has been stated that the Court, in the case of family arrangements, administers an equity which is not applied to agreements generally (*f*).

The question whether a person is heir or not, is a fact, or, at any rate, often depends upon a doubtful fact, e.g. whether a marriage has or has not been celebrated; nevertheless, it is clear, that if, as in the principal case, that fact be doubtful, two claimants, although one of them is afterwards clearly proved to be heir, may settle all disputes, especially to save the honour of the family, by dividing the property (*g*).

In *Neale v. N.* (*h*), James Neale and Joseph Neale, having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, and divided them accordingly, James, the elder brother, taking somewhat the larger share, a doubt being then entertained whether their father had a right to devise the lands James was, in fact, at the time of this agreement tenant in tail under

(*a*) *Stone v. Godfrey*, 5 De G. M. & G. 76, 90.

(*b*) Pollock, *Contracts* (1894), ch. 9, p. 420; Vaizey, *Settlements* (1887), ch. 19, n. 2, p. 1500; Story, *Eq. Jur.* (1892), ch. 3, p. 64; Fry, *Sp. Per.* (1892), ch. 7, p. 695.

(*c*) See Pollock, *Contracts* (1894), pp. 436, 441; Vaizey, *Settlements* (1887), p. 1502; Story, *Eq. Jur.* (1892),

ch. 3, p. 64 et seq.

(*d*) See the principal case and *Stockley v. S.*, 12 R. R., p. 189.

(*e*) See Vaizey, *Settlements* (1887), vol. ii., p. 1501.

(*f*) *Stockley v. S.*, 1 V. & B. 29; *Bellamy v. Sabine*, 2 Ph. 425.

(*g*) See *Leonard v. L.*, 2 Ball & B. 182; *Lausdowne v. L.*, 3 Mos. 364.

(*h*) 1 Keen, 672.

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the limitations of a surrender made by his grandfather, and, after James's death without issue, Joseph, having discovered his own title as tenant in tail, repudiated the agreement, and brought an action to recover the whole estate. On a bill being filed by the devisee of James, it was argued for Joseph that he had never agreed to abandon any right which he might thereafter acquire, and which was neither in his own contemplation nor in that of the party with whom the agreement was made; and that, in most of the cases which were cited, the parties had a full knowledge of all the circumstances enabling them to enter into a compromise. However, *Langdale, M.R.*, decreed Joseph to do all necessary acts to bar the entail, and vest the parts of the lands allotted under the agreement to James, upon the trusts of James's will, being of opinion that the agreement, though *parol*, yet being in the nature of a family arrangement, and followed by the uninterrupted several enjoyment (*a*) of the portions allotted to the two brothers respectively, is an agreement which this Court will enforce (*b*).

In *Pullen v. Bealy* (*c*) there was a mistake of law common to all parties as to private rights. Legacies were given, to be forfeited upon marriage without consent; one of the legatees did marry without consent, and a family arrangement, without the advice of counsel, took place, and articles were executed, giving that legatee the benefit of the legacy. It was insisted afterwards that the arrangement was made under a mistake of law that the condition was only *in terrorem*, which, under the circumstances, it was not; but Lord *Hardwicke* decreed specific performance of the articles, saying that at the time of the execution of the article the marriage without consent could not but be known, and that the parties to it could not possibly be supposed to be ignorant of that *fact* which happened some years before. That it was said, they might know the *fact*, and yet not know the *consequence in law*; but if parties were entering into an agreement, and the very will out of which the forfeiture arose was lying before them and their counsel while the drafts were preparing, the parties should be supposed to be acquainted with the consequences of law as to that point, and should not be relieved under a pretence of being surprised, with such strong circumstances attending it (*d*).

(a) See *Williams v. W.*, 2 Ch. 294.

(b) See also *Frank v. F.*, 1 Ch. Ca. 84; approved by *Cottenham, C.*, 6 Cl. & Fin. 966, and see 15 B. 301; *Stockley v. S.*, 1 V. & B. 23; 12 R. R.,

p. 189; *Heap v. Tonge*, 9 Ha. 90; *Manby v. Bewicke*, 3 Kay & J. 342; *Fowler v. F.*, 4 De G. & J. 250.

(c) 2 Atk. 587.

(d) See *Cann v. C.*, 1 P. W. 723; *Mildmay v. Hungerford*, 2 Vern. 243;

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In *Lawton v. Champion* (a) the children of John Lawton, a deceased remainderman, insisted as against their uncle Charles (a prior tenant for life in possession) that they were entitled, under the terms of a settlement, to have their portions raised from the death of their father in 1831. Some discussion took place, and a bill was filed by them. An arrangement was come to by deed, which, proceeding on the foundation of the validity of the claim, compromised the amount of the arrears of interest, and settled the amount of the future interest, which Charles thereby engaged to pay. It having been afterwards determined in another suit, that on the true construction of the settlement the claim of the children was unfounded, Charles instituted a suit to set aside the deed, and *Romilly*, M.R., made a decree in his favour. "In my opinion," said his Honor, "the thing compromised was not the right to have the portions immediately raised, but something collateral to it, and arising and flowing out of it. The liability of the plaintiff to pay was not, in fact, compromised; but the amount which he would have to pay, under a liability, assumed and admitted on both sides, was the thing compromised, and the only subject of the compromise. That is the view which I take of this case from the correspondence, and which the deed appears to me to confirm. It appears to me to have been entered into for the purpose of settling the question of the *amount* which the plaintiff was liable to pay to these ladies, and not to settle any question as to his liability to pay anything at all." And after referring to *Harvey v. Cooke* (b), as being exactly in point, his Honor added, "Undoubtedly a family arrangement was entered into in this case; but the question is, what it included. In my opinion, the liability of the plaintiff to pay anything, or in other words, the fact that the money was raisable on the death of John Lawton, was not an ingredient in that arrangement, and did not form a term of it. That question was not present to the mind of either party at the time when they entered into this arrangement, as one which could be contested; the arrangement was limited to matters in difference, flowing out of and proceeding from that which was considered to be an undoubted liability."

Upon a principle somewhat similar it has been determined that a compromise under the Court will not exclude a point of construction

Powell v. Smith, 14 Eq. 85, but see cases there cited.
 judgment of Lord Westbury in *Cooper* (a) 18 B. 87.
v. Phibbs, *supra*, p. 231, and other (b) 4 Russ. 57.

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not then under consideration (a). But of course questions involved in the compromise will not be permitted to be reopened (b).

Where payments were made under a mistaken construction of a doubtful clause in a settlement, the Court refused to direct them to be refunded, after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially as subsequent family arrangements had proceeded on the footing of that construction (c).

And where a deed of family arrangement has been acted upon for many years, and no fraud is imputed, the Court will not set aside or alter such deed upon the mere allegation by some of the parties to it, that its provisions did not carry out their intentions (d).

Where parties come to be relieved against the consequences of mistakes in law, it is the duty of the Court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done. Parties may be erroneously advised as to the law, but they may be told in what circumstances the question of law depends, and in what mode it may be tried, and they may determine that (whether the advice they have received be well or ill founded) they will give up the question in favour of the party with whom it arises. Cases of this nature, therefore, require the most careful examination, and particularly when they arise between parent and child (e).

Good Faith. Full Disclosure.—An agreement to compromise cannot be sustained (even as a family arrangement) if by design, or even by accident, there has not been a full disclosure of all material circumstances in the knowledge of one of the parties, and it is immaterial whether information be asked for by the other parties or not. In *Gordon v. Gordon* (f), an agreement was entered into between two brothers, the younger of whom disputed the legitimacy of the elder, for the division of the family estates. At the time of the agreement the younger brother was apprised of a private ceremony of marriage which had passed between their parents, but did not communicate that fact to the elder. The legitimacy of the elder brother being

(a) *Bennett v. Merriman*, 6 B. 351; *Rogers v. Ingham*, 3 C. D. 369.

(b) *Re South American, &c. Co.*, (1895) 1 Ch., p. 50. (d) *Bentley v. Mackay*, 31 B. 143.

(c) *Clifton v. Cockburn*, 3 My. & Godfrey, 5 De G. M. & G. 90. (e) Per *Turner*, V.-C., *Stone v.*

K. 76; and see *G. W. R. Co. v. Cripps*, (f) 3 Swans. 400.

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established on the trial of an issue directed, Lord Eldon after the lapse of nineteen years, rescinded the agreement.

"If," said his Lordship, "the youngest son, knowing that fact, of which the plaintiff was ignorant (and the Court held on the evidence that he did so know), dealt with him without disclosing it, whether the omission of disclosure originated in design, or in an honest opinion of the invalidity of the ceremony, and of a want of obligation on his part to make the communication, the agreement cannot be sanctioned by the Court" (a).

And where the defendants propounded a will for probate, which was opposed by the plaintiff, but ultimately a compromise was agreed to, under which the will was admitted to probate, the plaintiff having afterwards discovered that the will was a forgery, the compromise was set aside on the ground that one of the defendants had concealed his knowledge of the forgery, and probate was revoked by the Probate Division (b).

So, where a plaintiff entered into a compromise to accept from the defendant a smaller sum than was due, upon the representation made to him by the defendant's solicitor of the poverty of the defendant, and that his father, a man of property, would not assist him, whereas the father, to the knowledge of the solicitor making the representation, had lately died intestate, it was held the compromise could not be supported (c).

And if parties are not on *equal terms*, and one of them stands in such relation to the other as renders it incumbent on him to give a fuller account of the matter or question in dispute than he has done, the Court, although no intentional fraud may be imputable to such person, will not support a compromise entered into between the parties (d).

A concealment, however, of truth, or a suggestion of what is false will not affect the validity of a compromise, unless it be relevant to the matter to be compromised (e).

Contracts of this kind will not of course be supported if they are

(a) And see *Pusey v. Desbouverie*, 3 P. W. 315, 321; *Harvey v. Cooke*, 4 Russ. 58; *Groves v. Perkins*, 6 Si. 576; *Leonard v. L.*, 2 Ball & B. 171; *Smith v. Pincombe*, 3 Mac. & G. 653; *Cook v. Greves*, 30 B. 378; *Greenwood v. G.*, 2 De G. J. & S. 28; *Tennent v. Tennents*, 2 L. R. H. L. 6, 9, 10; *Fane v. F.*, 20 Eq.

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(b) *Priestman v. Thomas*, 9 P. D. 70.

(c) *Gilbert v. Endean*, 9 C. D. 259, 266.

(d) *Pickering v. P.*, 2 B. 51, 56; *Pusey v. Desbouverie*, 3 P. W. 315, 320, 321; *Sturge v. S.*, 12 B. 229.

(e) *Maynard v. Eaton*, 9 Ch. 114.

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in any way unconscionable, as where the party surrendering his rights was a person liable to imposition and without professional advice (*a*), or where a person under the influence of threats, and under apprehension of arrest, and without adequate consideration or advice, has given a security as a compromise of doubtful rights (*b*), or where a deed in the nature of a family arrangement has been executed by a *cestui que trust*, under pressure from the trustees in violation of their duties (*c*).

Power of Legal Adviser to compromise.—Neither counsel (*d*) nor solicitors (*e*) can compromise a case against the express wishes of their clients, and an action for so doing will lie against the latter (*f*), but not against the former (*g*). Both counsel (*h*) and solicitors being in ordinary cases entrusted with the general management of a cause, have power to compromise it, unless expressly forbidden so to do (*i*), and a solicitor is not guilty of actual negligence, provided he acts *bona fide* and with reasonable care and skill, and the compromise is for the benefit of his client, and is not made in defiance of his express prohibition (*k*): and it seems that a compromise being within the apparent authority of counsel or solicitor, is binding on the client, notwithstanding he dissented, unless this dissent was brought to the knowledge of the opposite party at the time (*l*).

A consent to compromise given by counsel in the presence and with the sanction of his client may be withdrawn by leave of the Court before the order is drawn up, if given through error, mistake,

(*a*) *Dunnage v. White*, 1 Swans. 137. See also *Stockley v. S.*, 1 V. & B. 31; 12 R. R. 184.

(*b*) *Scott v. S.*, 11 Ir. Eq. R. 74.

(*c*) *Ellis v. Barker*, 7 Ch. App. 104; and see *Huguenin v. Basoley* and *Chesterfield v. Janssen*, post. and notes.

(*d*) *Swinfen v. S.*, 27 L. J. Ch. 35, 491.

(*e*) *Fray v. Vowles*, 1 Ell. & Ell. 389.

(*f*) *Fray v. Vowles*, supra.

(*g*) *Swinfen v. Chelmsford*, 5 H. & N. 890.

(*h*) *Strauss v. Francis*, 1 L. J. Q. B. 379; *Ellender v. Wood*, 32 Sol. Jo. 628; *The Alliance, &c. v. MacIvor & Co.*, 7 Times Rep. 599; *Lewis v. L.*, 45 C. D. 281; *Matthews v. Munster*, 20 Q. B. D. 141.

(*i*) *Prestwich v. Poley*, 18 C. B. (N. S.) 806; *Berry v. Mullen*, 5 Ir. Eq. 368.

(*k*) *Chown v. Parrott*, 14 C. B. (N. S.) 74.

(*l*) *Strauss v. Francis*, 1 L. R. Q. B. 379; *Brady v. Curran*, 2 Ir. Rep. C. L. 314; *Berry v. Mullen*, 5 Ir. R. Eq. 368.

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surprise or inadvertence (*a*), but after that time it can only be set aside on the ground of common mistake (*b*). The rule in the Chancery Division and the Queen's Bench Division is now the same, and a consent given by the authority of the client cannot be withdrawn unless there has been mistake or surprise (*c*). As to when the mistake is on one side only, see the cases below (*d*).

Infants.—If the Court, having all the necessary facts before it, sanctions a compromise on behalf of infants, and it afterwards turns out that the Court was mistaken, the infants have no redress, it being an error of judgment for which there is no remedy. But if by suppression or misstatement of facts the Court has been led to an erroneous conclusion, the persons who have done this are amenable to justice, and the Court will, if possible, set aside the transaction as against the innocent party (*e*).

The ordinary practice in cases of compromise in which infants are interested is to direct a reference to chambers as to whether the proposed compromise is beneficial (*f*): but if the judge is satisfied on the evidence before him, that will suffice (*g*). Where an action is pending, the terms of the proposed compromise should as a rule be brought before the Court, by a petition stating the terms, and verified by affidavits (*h*). In modern practice, a compromise on behalf of an infant is not unfrequently sanctioned upon summons, and where there is no action pending, the sanction is often obtained upon an originating summons under the provisions of the Rules of the Supreme Court, 1883, Order 55, r. 3 (*f*).

The Court has no power to sanction a compromise against the opinion of the next friend, or the guardian *ad litem* and counsel,

(*a*) *Holt v. Jesse*, 3 C. D. 177; *Rogers v. Horn*, 26 W. R. 432; *Hickman v. Behrens*, 99 L. T. Jo. 308; *Harvey v. Croydon, &c.* *infra*; *Re West Devon, &c.*, 38 C. D. 51.

(*b*) *Davis v. D.*, 13 C. D. 861; *A.-G. v. Tomline*, 7 C. D. 389; *Furnival v. Bogle*, 4 Russ. 142; *Huddersfield B. Co. v. Lister*, (1895) 2 Ch., p. 283.

(*c*) *Harvey v. Croydon, &c.*, 26 C. D. 249; *Elias v. Williams*, 52 L. T. 39.

(*d*) *Mullins v. Howell*, 11 C. D. 763; *Barker v. Purvis*, 56 L. T. 131; *Gil-*

bert v. Endean, 9 C. D. 259; *Re West Devon, &c. Co.*, 38 C. D. 51 (C. A.); *Hewitt v. The Hull, &c. Society*, 4 Times Rep. 35.

(*e*) *Brooke v. Mostyn*, 2 De G. J. & S. 373, reversed on another point; 4 L. R. H. L. 304; see also *Stainton v. The Carron Company*, 6 Jur. (N. S.) 360.

(*f*) Seton (1893), p. 832, Form 1.

(*g*) *Lippiat v. Holley*, 1 B. 423; *Wall v. Bushby*, 1 Bro. Ch. 484.

(*h*) *Gray v. Paull*, 46 L. J. Ch. 818; see *Re Birchall*, *infra*.

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and if the next friend is exercising his discretion *bonâ fide* (a) he cannot be interferred with (b). Before sanctioning a compromise the Court requires an affidavit by the next friend or guardian, and by the solicitor, together with the written opinion of the junior counsel to the effect that they consider the proposed compromise for the benefit of the infants (c). On a petition for a compromise in which the interests of infants were concerned, the infants were not represented by a separate solicitor; the matter was ordered to stand over in order that they might be represented by an entirely independent solicitor, who could state that the compromise was for their benefit (d).

Married Woman.—The Court has jurisdiction to sanction, on behalf of a married woman, a compromise of a suit, to make a trustee liable for a breach of trust in relation to a fund in which the married woman has a reversionary interest (e). As to property to which she is entitled to her separate use, as she can contract to the extent of such property and can sue and defend as if she were a *feme sole* (f), she can bind herself by a compromise with respect to such property, or with respect to her litigation (g).

As to agreements to separate founded upon a compromise of litigation, see *Wilson v. W.* (h).

Absent Parties.—By a rule of the Supreme Court (i), it is provided that “where in proceedings concerning a trust a compromise is proposed and some of the persons interested in the compromise are not parties to the proceedings, but there are other persons in the same interest before the Court and assenting to the compromise, the Court or a Judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise

(a) See *Rhodes v. Swithenbank*, 22 Q. B. D. 577.

(b) *Re Birchall*, *infra*.

(c) *Re Birchall* (C. A.), 16 C. D. 41; *Gray v. Paull*, *supra*.

(d) *Howe v. Robinson*, 34 Sol. Jo. 620.

(e) *Wall v. Rogers*, 9 Eq. 58. And see as to her separate property, though subject to restraint on anticipation, *Wilton v. Hill*, 25 L. J. Ch. 150; and see generally as to the power of the Court to sanction compromises by per-

sons under disability, *Cahill v. C.*, 8 App. Cas. 420; *Brooke v. Mostyn*, 4 L. R. H. L. 304; *Cahill v. C.*, p. 426 and p. 430; and *Seton*, 1893. 786, 790.

(f) Married Women's Property Act, 1882, s. 1, s. 2.

(g) See *Besant v. Wood*, 12 C. D., p. 622; and judgment of *Selborne, C.*, in *Cahill v. C.*, 8 App. Cas., p. 427.

(h) *Post*, under head of “Husband and Wife.”

(i) R. S. C. Nov. 1883, O. 16, r. 10a.

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and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts."

It is doubtful whether this rule applies where all the persons to be served are out of England (*a*). The Court under this rule may bind absent persons who have not assented to the compromise, but not such as have dissented from it, but it may sanction the compromise after making full provision for the rights of such dissentient parties (*b*).

Corporations and Companies.—A corporation or a company has, as incident to its existence, the same power of compromising claims made against it as an individual has (*c*), but *scarcely* in both cases, and certainly in the case of a company, it must bind itself by some formal proceeding—in the case of a company by the action of the directors, or by a resolution of the shareholders in a general meeting (*d*).

Enforcing Compromises.—The Court will specifically enforce private compromises of right provided there is a valid contract between the parties (*e*). It will also enforce by staying proceedings a compromise for putting an end to litigation (*f*), as in *Eden v. Naisb* (*g*), where there was an agreement to compromise an action for the dissolution of a partnership after judgment therein; the terms were in writing and signed; the plaintiff alleged that he signed under a misapprehension; but upon a summons being taken out for a stay of proceedings on the terms of the agreement, an order for stay was made thereon (*h*). So on motion for judgment (*i*).

In *Hart v. H.* (*k*) specific performance was ordered of an agreement to compromise a petition in the Divorce Court.

If a company is in liquidation a compromise entered into between

(*a*) *Re Sapeote*, 38 Sol. Jo. 281.

(*b*) *Collingham v. Sloper*, (1894) 3 Ch. 716, C. A.

(*c*) *Re Norwich, &c., Society*, 8 C. D. 334; *Dixon v. Evans*, 5 L. R. 11. L. 606.

(*d*) *Miles v. New Zealand, &c., Co.*, 32 C. D., p. 286.

(*e*) *Fry, Sp. Perf.* (1892), § 1578.

(*f*) See Judicature Act, 1873, s. 24,

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(*g*) 7 C. D. 781.

(*h*) See *Pryer v. Gribble*, 10 Ch. 334; *Re Gaudet Frères*, 12 C. D. 882; *Scully v. Dundonald*, 8 C. D. 658.

(*i*) *Sharpe v. Wilnot*, 84 L. T. Jo. 297; *Baker v. Blaker*, 55 L. T. 723.

(*k*) 18 C. D. 670; and see *Lancaster v. L.*, (1895) P. 75, and n. (*b*), p. 246, *infra*.

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the official liquidator and a stranger may be enforced by summons in the winding up (a).

In *Smayth v. S.* (b) a compromise of certain divorce proceedings was made a rule of Court on an "*ex parte*" motion, but the terms of the compromise so providing. If such provision is not made it cannot be made a rule (c). A compromise may be enforced by motion in any Court in which pending proceedings are compromised (d).

If the intended compromise of an action fails, but the plaintiff has received some advantage, he will not be allowed to retain such advantage and continue the action (e).

Setting aside a Compromise.—A judgment compromising an action, which has been passed and entered, cannot be set aside except by bringing a fresh action, unless (1) There has been a slip within R. S. C. 1883, O. 28, r. 11; (2) the judgment, as drawn up, does not correctly state the decision of the Court; (3) the parties consent (f). Different considerations may apply to interlocutory orders and judgments not passed and entered, but such applications are generally founded on allegations of fraud or misrepresentation, and it is convenient that the evidence in support should be *viva voce* and not by affidavit as to information and belief (g).

2. Family Arrangements.

"From the case of *Stapilton v. Stapilton* (h) down to the present day the current of authorities has been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the same family (and especially, I may observe, where those doubts have related to a question of legitimacy), and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers" (i).

(a) *Re Gaudet, &c.*, 12 C. D. 882.

(b) 18 Q. B. D. 544.

(c) *Graves v. G.*, 67 L. T. 420.

(d) *The Alliance, &c., Syndicate v. MacIvor, &c., Co.*, 7 Times Rep. 599.

(e) *Henderson v. The Underwriting, &c., Assn.*, 65 L. T. 616, 732; *Guy v. Walker*, 8 Times Rep. 314.

(f) *Ainsworth v. Wilding*, (1896) 1 Ch. 673, where the cases are collected.

(g) See the judgment of *Jessel, M.R.*, and *Cotton, L.J.*, in *Gilbert v. Endeau*, 9 C. D. p. 266; *Mullings v. Howell*, 11 C. D. p. 766.

(h) See the remarks of Sir *T. Plumer* on this case in *Dunnage v. White*, 1 Swan., p. 151, and of Lord *Cottenham* in *Stewart v. S.*, 6 Cl. & Fin. p. 967.

(i) Per *Sugden, C.*, in *Westby v. W.*, 2 Dr. & War. 503; but see the

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And a family arrangement may also be implied without any express written contract, from a long course of dealing between the parties (a).

Any transaction between father, tenant for life, and son, tenant in tail of property, entered into upon barring the entail, is looked upon in the nature of a family arrangement; and in such a case, apparent inadequacy of consideration, and the circumstance that the property is reversionary, will have but little weight. In *Cory v. C.* (b), on the fact appearing that one of the parties was drunk at the time an agreement was entered into to settle disputes in a family, Lord *Hardwicke* thought that it was not sufficient to set the agreement aside, as it was reasonable, and it did not appear that any unfair advantage was taken. And he observed, that, "if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted, though there might be something of that sort, yet if the agreement be reasonable, the Court will not set it aside" (c).

In *Bellamy v. Sabine* (d) an agreement between father and son, for disentailing an estate, and for a conveyance to the son in fee, the main consideration moving from the son was an undertaking to pay the father's debts; the circumstance of several of the most important items being left in blank was held insufficient to set the transaction aside as against the father, though the son was only just come of age, as a family arrangement of such a description could not be supposed to have depended upon a very exact calculation of the amount of debts (e).

"In regarding settlements of this character, claims to upset them, and the rights of parties thereunder, the Court gives weight to considerations which on other occasions would scarcely be allowed in the

observations of Mr. Vaizey, referred to *supra*, p. 233 (e). And see *Stockley v. S.*, 1 V. & B. 23, 12 R. R. 184; *Cood v. C.*, 33 B. 314; *Williams v. W.*, 2 Ch. 294; *Huguenin v. Basoley*, p. 271, *infra*; *Chesterfield v. Jansson*, p. 314, *infra*.

(a) *Clifton v. Cockburn*, 3 My. & K. 76; *Williams v. W.*, 2 Ch. 294.

(b) 1 V. 19.

(c) And see *Wycherley v. W.*, 2

Eden, 175; *Persse v. P.*, 7 Cl. & Fin. 318.

(d) 2 Ph. 425.

(e) See also *Hoghton v. H.*, 15 B. 305, where the law is fully considered by *Romilly*, M.R.; *Dunsdale v. D.*, 3 Drew. 556; *Baker v. Bradley*, 7 De G. M. & G. 597; *Hartopp v. H.*, 21 B. 259; *Head v. Gollee*, John. 536; *Jenner v. J.*, 2 De G. P. & J. 359.

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scale" (c). In re-settlements (b) it is a proper precaution to take care that the position of the son as tenant in tail is fully explained to him, and also the limitations of and burthens upon the property which are proposed to be made, and this either by the father's solicitor or an independent solicitor or counsel, and to omit these precautions is to incur risk (c). And in such cases the effect or extent of the parental influence (d) will not be regarded (e), unless where a father takes a benefit to the detriment of the son (f), when the Court may inquire whether there has been undue influence (g). Even if there is unfairness, the benefit being abandoned, the rest of the settlement will stand good (h). In *Hoblyn v. H.* (i) the son had the advice of an experienced estate agent, the estate was exonerated from a charge in favour of the father and from the mother's jointure (h), but the rest of the re-settlement stood good.

A *bona fide* family arrangement (previous to the abolition of the usury laws) would not have been deemed usurious merely because it secured a loan with legal interest, and the borrower, by way of settlement, made other provisions for the lender (l).

And where a deed is honestly intended as a family arrangement, and not executed with the view of defeating creditors, it will be valid under 13 Eliz. c. 5, although some debts may be defeated thereby (m). But a deed, though valid as a family arrangement, may be void as against creditors (n).

If an arrangement between two parties is, on moral principles, fair, or is such as is sustainable, as between them, on the ground of its being a family transaction, it will not be rendered invalid because it may have been concocted and brought about by a third party, with a fraudulent intention of benefiting himself (o).

(a) Per *Kekewich, J.*, in *Hoblyn v. H.*, 41 C. D., p. 204.

(b) See *Vaizey, Settlements* (1888), p. 1505.

(c) See *Hoblyn v. H.*, *supra*, p. 205.

(d) *Hartopp v. H.*, 21 B. 266; *Dimsdale v. D.*, 3 Drew. 569.

(e) *Fano v. F.*, 20 Eq., p. 706; *Turner v. Collins*, 7 Ch., p. 340.

(f) See *Archer v. Hudson*, 7 B. 560; *Baker v. Bradley*, 7 De G. M. & G. 597.

(g) *Hoblyn v. H.*, 41 C. D., p. 207; *Hoghton v. H.*, 15 B., p. 314; *Jenner v. J.*, 2 De G. F. & J., p. 375.

(h) *Hoblyn v. H.*, *supra*.

(i) *Supra*.

(k) See *Heron v. H.*, 2 Atk. 160; *Carpenter v. Heriot*, 1 Eden, 338.

(l) *Arkwright v. Huntley*, Printed Cases, D. P., 1825, cited Sugd. Prop. 86.

(m) *Re Johnson*, 20 C. D. 389; see *Re Maddever*, 37 C. D., p. 526; *Hanco v. Harding*, 20 Q. B. D. 732.

(n) *Penhall v. Elwin*, 1 Sm. & G. 258.

(o) See *Bellamy v. Sabine*, 2 Ph. 425.

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In a proper case a deed carrying into effect a compromise may be rectified. Thus where a deed was made for the purpose of carrying into effect a family arrangement, and it contained a declaration of trust inconsistent with the actual rights of the parties, and there was no evidence that the inconsistency was known to, or contemplated by, the parties or their solicitors, or that their actual rights were intended to be altered, it was held that the declaration ought to be varied (*a*).

It has been decided by the highest authority, that a compromise of a family dispute is not rendered invalid, in consequence of one of the parties not distinctly understanding his rights, if they were understood by his agents, by whose acts and knowledge, in the absence of fraud, the principal is bound (*b*), and the principle is the same in the law of Scotland as in the law of England and in the civil law (*c*).

Where a family arrangement is entered into upon the assumption that all the parties named in a deed will execute it, and one of them does not do so, it will not be binding upon the others although they execute it (*d*); and the result is the same where one of the parties, from any incapacity, as, for instance, coverture, cannot execute the deed in a valid or binding form (*e*).

Where a bill alleged a judgment obtained by fraud and a subsequent compromise, and sought to have the whole transaction set aside on the ground of fraud or to have the compromise carried out, and in the opinion of the Court the case of fraud failed, the Court refused to enforce the compromise, and the whole bill was dismissed (*f*).

Letters written, after a dispute has arisen, with a view to a compromise and "without prejudice," cannot be used in evidence against the party by or on behalf of whom they were written. In *Houghton v. H.* (*g*), *Romilly, M.R.*, said, "that such communications made with a view to an amicable arrangement ought to be held very sacred; for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences" (*h*).

(*a*) *Ashurst v. Mill*, 7 Ha. 502.

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(*b*) *Stewart v. S.*, 6 Cl. & Fin. 911; where all the authorities are examined by Lord Cottenham.

(*f*) *Cawley v. Poole*, 1 Hem. & M. 50.

(*c*) *Ibid.*

(*g*) 15 B. 321. See *Cadell v. C.*, 8 App. Cas. 420.

(*d*) *Peto v. P.*, 16 Si. 590.

(*h*) And see *Jones v. Foxall*, 15 B.

(*e*) *Bolitho v. Hillyar*, 34 B. 180; and see *Taylor v. Cartwright*, 14 Eq.

388, 396; *Re Monsell*, 6 Ir. Ch. R., p. 254; and as to the general rule of

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Husband and Wife.—In *Jodrell v. J.* (a) a singular deed between husband and wife was upheld as a family arrangement. In that case, a wife having instituted a suit against her husband for a divorce, an arrangement was come to, and the husband executed a deed, by which he assigned a house to trustees, upon trust to permit the wife to enjoy it and accommodate herself and children, and an income of 4,000*l.* a year was also provided for her separate use, to keep up the establishment for herself and children, "upon such a scale, and regulated in such a manner, as she should think fit;" and the surplus was to be repaid to the husband. The deed provided, that so long as the husband should be desirous to reside in the house, "and to conform to the spirit and intention of the deed, and to partake of the benefit of the establishment to be kept up therein by the wife, he should be at liberty so to do." The suit was discontinued, and the husband partook of the establishment. *Langdale*, M.R., held, that the deed was not void on any ground of public policy; and that, being a family arrangement, and a compromise of disputed rights, there was a sufficient consideration; that it was not void for uncertainty; and that the Court would enforce its due performance both by the wife and the husband.

With regard to the other points which were raised—want of consideration and the want of mutuality—*Langdale*, M.R., said: "I do not think that they ought to influence the mind of the Court at all. This is not a matter of pecuniary consideration, but a family arrangement,—a compromise of litigated rights between the parties."

Separation Deeds.—As to separation deeds generally, and as to the powers of a wife to make binding compromises with her husband with respect thereto, see *Wilson v. W.*, under the heading of "Husband and Wife," post (b).

evidence on this point, see *Paddock v. Forrester*, 3 Mac. & G. 903; and the judgment of the Court of Appeal in *Walker v. Wiltshire*, 23 Q. B. D. 325, overruling the judgment of V.-C. *Kindersley* in *Williams v. Thomas*, 31 L. J. Ch., p. 676, 2 Dr. & Sm. 29, that such letter might be used by the writer; and see *Jones v. Foxall*, 21

L. J. Ch. 725; *Re Daintry*, 9 Times Rep. 452, Art. 97 L. T. Jo. 263.

(a) 9 B. 45.

(b) As to the compromise of suits for restitution of conjugal rights, see *Stanes v. S.*, 3 P. D. 42; *Hunt v. H.*, 31 L. J. Ch. 160, 32 L. J. Ch. p. 168; *Rowley v. R.*, 1 L. R. H. L. Sc. & D. 63.

CONSTRUCTIVE FRAUD (a).

HUGUENIN *v.* BASELEY.

1807. 14 V. 273; 9 R. R. 276.

Undue Influence—Voluntary Settlement obtained by an Agent.

Voluntary settlement by a widow upon the defendant, a clergyman, and his family set aside, as obtained by undue influence and abused confidence in the defendant, as an agent undertaking the management of her affairs; upon the principles of public policy and utility, applicable to the relation of guardian and ward.

THE object of the bill in this cause was to set aside a conveyance made by the plaintiff Mrs. Huguenin, previously to her marriage with the other plaintiff, her second husband, as having been improperly and fraudulently obtained. The following are the principal circumstances established by evidence and admission, under which this relief was sought.

In 1803, Mrs. Huguenin, then Mrs. Hill, appeared to be entitled in fee simple to the manors of Cleydon and Hampton Gay, and other estates in Oxfordshire, under the ultimate limitation of the reversion by a will dated 1768, to her father, Richard Hindes, who had gone to Jamaica, where he acquired considerable property, real and personal, which upon his death also descended to her.

After some correspondence with their solicitors in England, she, in September, 1803, returned with her husband from Jamaica. He died in October, 1803; and in November, she being then about the age of forty, first became acquainted with the defendant, Thomas Baseley, a clergyman, who was also connected with the family of

(a) As to other cases of constructive fraud, see *Fox v. Mackreth*, post, Purchase by a Trustee: *Aleyn v. Bolchier*, post, Fraud upon a Power; *Strathmore v. Bowes*, post, Fraud on Marital Rights.

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Hindes, and had with other persons, upon the death of the testator in 1798, instituted a suit claiming as heirs-at-law of Richard Hindes; in which cause an inquiry, directed by the Lord Chancellor, produced the title of Mrs. Huguenin as the only child of Richard Hindes.

The bill stated, that the defendant Baseley, with the view of getting the control and management of the said estates, and of getting them ultimately settled upon himself, procured an introduction to Mrs. Huguenin; and having by various means ingratiated himself with her, represented that her solicitors had mismanaged and neglected her property, and induced her, then a stranger, having no friends or relations in England, and being quite ignorant of the value of property, to withdraw her affairs from those solicitors and to place them in the hands of the defendant; who, with such design, wrote the following letter, which she, by his inducement, caused to be copied and signed, and sent to the solicitors:

"SIRS,—Having been so unfortunate as to lose the best of husbands and the sincerest friend by the premature death of Mr. Hill, I feel myself, as it were, left in that unprotected state that I now want the assistance of some friend with whom I can advise in the adjustment of my affairs, and who will kindly interpose in seeing that my property is managed to the best advantage. From reflection, I have the greatest reason to believe that Providence has raised me up a friend, and that friend is Mr. Baseley, who will take upon him the trouble of bringing all my affairs into such a plan as I shall hereafter be enabled to conduct them with facility to myself. Impressed with this agreeable idea, I beg leave to inform you that I commit (subject to my own inspection) the perfect arrangement of my business with you into Mr. Baseley's hands; and hope that you will prepare, without any delay, every account that you have standing against me, with the deeds, &c., of the estate at Hampton. As I wish to leave London at Lady-day next, I must desire that no delay on your part will take place. Mr. Baseley will be ready to meet you on the business whenever you will appoint a day. With this determination, I remain, &c.

"ANN HILL."

The deeds were accordingly delivered to Baseley, and were

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deposited by him with his solicitor. The bill farther represented, that the defendant artfully dissuaded the plaintiff from residing in the house at Hampton Gay, and letting the estate, as she had proposed, and recommended to her a surveyor, who gave a very unfavourable account of the situation of the estate; and the defendant Baseley soon afterwards offered her 400*l.* a year for a lease of the whole, clear of all expenses, and keeping the premises in repair, representing 420*l.* a year as the utmost value, which was confirmed by his solicitor; that she executed the deeds under the persuasion of the solicitor that they were her will, and the lease to Baseley, and that **she had no intention to give away or settle her estate, &c.**

By the deed dated the 5th of May, 1804, which was the subject of the bill, the plaintiff, Mrs. Huguenin, in consideration of 10*s.*, conveyed the Hampton Gay estates to a trustee, his heirs and assigns, to the use that she and her assigns might, during her life, receive out of the said manor, &c., an annuity of 400*l.*, secured by a trust term of 500 years; and subject thereto, to the use of the defendant Baseley, for life, without impeachment of waste, with remainders to trustees to preserve contingent remainders to his wife for life, to their children, born or to be born, in tail, with cross remainders, and the ultimate remainder to Mrs. Huguenin. The value of that estate was **rather more than 400*l.* per annum.**

The defendant, Thomas Baseley, by his answer represented, that from the time of his first acquaintance with the plaintiff, a great intimacy took place, and she expressed great affection for him and his family: that she complained of the conduct of her solicitors, declaring her intention of taking the management of her affairs from them; and upon her application, he recommended to her his solicitor and a surveyor, and she intimated to the defendant her intention of settling her estates on him and his family, and requested him to write to her solicitors, to acquaint them that she should take her affairs out of their hands; and the defendant at her request did in her presence, and with her sanction, and according to her directions, write the form of a letter for that purpose, which the plaintiff, as he believes, copied, and sent to her solicitors; but the defendant positively denies that such letter was written at his instigation, or by his desire; on the contrary, he wrote the same at the pressing desire of the plaintiff: and though the language of the letter was the defendant's, yet the substance

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was in fact dictated by her. In another part of the answer, the defendant denied that he induced her to send that letter, stating his belief that it was written by him, but that it was so written at the particular instance and request of the plaintiff, who desired him to draw up such letter, as before mentioned : and he believes he did, upon that occasion, state to the plaintiff, that, if it was her wish to discharge her solicitors, such letter ought to be in her own handwriting, as it would not be so proper for it to appear in his handwriting, and the plaintiff did copy such letter.

The answer farther stated, that the plaintiff frequently expressed to the defendant a wish to settle her affairs, and make a disposition of her property, inquiring whether the defendant was related to her, and who was her heir-at-law ; and being informed, expressed a great dislike to that family. And after various conversations, she repeated her determination to settle the Hampton Gay estate on the defendant and his family ; and in March, 1805, without any persuasion, suggestion, or influence, she gave instructions accordingly ; and the defendant understood her intention to be, to settle the estate so as to reserve to herself a rent-charge for her life about equal to the reasonable rent : and that it was her wish that the defendant should go and reside there immediately with his family, so that the mansion house might be kept up : declaring, that she would never reside there on account of the trouble of repairing, &c. ; and the defendant denied all the charges of fraud, influence, &c.

The answer of the attorney who prepared the deed, stated, that when instructed by her to prepare the settlement, he recommended to her to make a will, which might be revoked or altered : when she replied, that she would not do it by will, on that account, as, if she should alter her situation, she intended it should not affect the settlement of her property. The defendant, according to the voluntary instructions of the plaintiff, prepared two deeds of settlement, viz., that of the 5th of May, 1804, as to the Hampton Gay estate, in the bill mentioned, and the other, dated the 21st of June, 1804, relating to all her other estates and property. In the former deed, blanks were left for the plaintiff's rent-charge and the names of the trustees, and she made alterations as to the uses among Baseley's children, and as to the ultimate limitation, which originally was to Baseley in fee. That deed was settled, and the other prepared

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by counsel; and they were voluntarily and deliberately executed and the blanks filled up by her direction.

This answer farther stated, that, in the deed of the 21st of June, 1804, the defendant Thomas Baseley, and this defendant, and William Sleet, of Jamaica, were named trustees, and the estates and property therein comprised were conveyed and assigned upon trust during the life of the plaintiff, Ann Huguenin, to convey, &c., according to her appointment, and to her separate use, notwithstanding coverture; and, after her decease, for any future husband surviving her, for his life, with remainder to her children by any such marriage as tenants in common in tail, with cross-remainders; remainder to her mother, and William James Clarke and the survivor, and to the children of Clarke; with remainder to Thomas Baseley and the two other persons named as trustees, as tenants in common; and 5,000*l.* was settled on Mary Ann Elliott; and she was directed, during her minority, to be brought up by Mrs. Baseley, who was to receive the interest of her fortune: 2,000*l.* on Elizabeth Eleanor Clarke; 100*l.* a year on Mrs. Hindes; 200*l.* a year on William James Clarke; and by that deed are settled several estates in Jamaica, with the stock; several sums of money due from different persons; a leasehold estate in Middlesex; the Manor of Cleydon, in the county of Oxford, and all the estates real and personal, then late the property of Thomas Hindes, not before conveyed and settled by the plaintiff, and other estates real and personal, stated to be mentioned in the schedules.

This answer also denied all the charges of fraud, misrepresentation, &c.

Sir *S. Romilly*, Mr. *Hollist*, and Mr. *Trotter*, for the plaintiffs.—The authorities against permitting a transaction of bounty to take effect between persons standing in certain relations are numerous. Among those relations, that of guardian and ward is not for this purpose confined to persons so related in a strict sense—as under an appointment of guardian by will, or by order of this Court; but the rule includes any person placing himself in that situation (a):
* * * This is an instance of a very peculiar species of influence

(a) *Hylton v. H.*, 2 V. 547; *Pierse v. Waring*, cited 1 V. 380; 2 V. 548, stated from the Reg. Lib. in Mr. Cox's note, 1 P. W. 121, to the Duke of Hamilton v. Mohun; *Hatch v. H.*, 9 V. 292.

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gained over the mind of this lady by no common means ; appearing by the letter, written or dictated by the defendant for Mrs. Huguenin to copy, in terms which he cannot be supposed to use in the light and profane way that too frequently occurs. The English Courts of justice do not afford an instance of influence acquired by such means (a) ; but in foreign Courts such instances have occurred. According to Pothier, it has been decided, upon the same principles of public utility, that a confessor, or director of the conscience, a person to whom another trusted his spiritual concerns in matters of religion, cannot take any bounty from the person to whom he acts in that character, and the apprehension of the empire which these persons obtain, was carried so far that a gift to the order of which they were members was not allowed to have effect.

Mr. Richards, Mr. Foulblanque, Mr. Hart, Mr. Martin, Mr. Leach, and Mr. Wetherell, for the defendant.

Sir Samuel Romilly, in reply.—This bill puts the relief it prays, directly upon the ground of undue influence, exerted by the means of spiritual ascendancy, distinctly charging that the defendant had taken upon himself to be the adviser of this lady, and the manager of her property, and stating the letter as an instance of that influence. But, divesting this case of that relation and influence, and considering it as the case of a stranger, the evidence of fraud or misapprehension is so strong, that this transaction could not possibly stand. Upon all the evidence it cannot be represented that, when she executed the deed, she was apprised of its nature. How is her sudden change in so short a period, from great anxiety about this estate, to be accounted for, but from the effect of a sort of fascination ? Of what consequence was it to Mrs. Huguenin what repairs were to be done, what conditions were to be kept, according to the evidence, upon the supposition that she was parting with the estate for ever ? The removal of her husband's corpse to be buried at Hampton Gay is another circumstance utterly inconsistent with the defendant's representation that she did not intend to remain the proprietor. Having a mother, a half-brother, and sister, she was not at a loss for an object

(a) See *Norton v. Kelly*, 2 Eden, 286, by a dissenting minister and unduly an instance of undue influence acquired exercised, 9 R. R., p. 282 (n.)

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of bounty. The evidence as to her conversation with the attorney, suggesting to her that a will would be revocable by a change of her circumstances, shows that she looked to the possibility of a second marriage. Her expression of satisfaction at having attained her object cannot be explained upon the supposition that she was giving away her estate, but may be accounted for if she was to get rid of the trouble attending it.

In these cases, one of the strongest circumstances is the appearance by one person of consulting only the interest of another, and neglecting his own. The passage in Cicero (*a*) is most applicable:—

“Totius autem injustitie nulla capitalior est quam eorum, qui, cum maxime fallunt, id agunt, ut viri boni esse videantur.”

The duty imposed upon the defendant by merely undertaking the concerns of this lady, made it impossible for him to take the whole of her estate; for it is not necessary to go to the extent that he could not accept any bounty. He took upon him the entire management of her affairs—acting as her agent, receiving her rents, attending arbitrations, &c., &c. The rule is not confined to attorneys or persons entitled to reward. *Proof v. Hines* (*b*) was the case of a tradesman; who officiously interfered; *the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another* (*c*); and this case discovers one of a very peculiar nature,—influence obtained through the sacred character of a minister of religion. Though there is no case (*d*) in which the Court has proceeded upon such grounds, the general principle has prevailed, where the means of acquiring influence were much less powerful,—the respect of a child or ward for a parent or guardian. Pothier says, that, by a latitude of interpretation, proceeding upon principles of public utility, that ordinance, expressly concerning only a tutor or administrateur, has been extended to the master of a school; the director of the conscience; the physician, who is not permitted during his attendance to take a conveyance from the patient; and to other relations, in which authority or influence must be supposed to exist.

(a) Cic. de Off., lib. 1, s. 13.

(b) Cas. t. Talbot, 111.

(c) See Dent v. Bennett, 4 My. & C. 277, where this proposition is

approved of by Lord Cottenham.

(d) See Norton v. Kelly, 2 Eden, 286, supra.

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For the proper determination of this case, however, it is not necessary to rely on such authorities. The decisions of English Courts of Justice are amply sufficient. The same doctrine, stated by your Lordship in *Hatch v. H.* (a), was laid down by Lord Chief Justice Wilmot, in *Bridgman v. Green* (b). There was in that case much evidence that the person was perfectly aware of what he was doing, and had repeatedly confirmed it. Upon that, Lord Chief Justice Wilmot's observation is, that it only tends to show more clearly the deep-rooted influence obtained over him (c). "In cases of forgery, instructions under the hand of a person whose deed or will is supposed to be forged, to the same effect as the deed or will, are very material; but in cases of undue influence and imposition they prove nothing; for the same power which produces one, produces the other; and, therefore, instead of removing such an imputation, it is rather an additional evidence of it."

Having before (d) mentioned the distinction of the Roman law between liberality and profusion, he says, our laws strike no such boundary—"stat pro ratione voluntas is the law with us;" and this Court never did nor ever will annul donations merely as being improvident, and such as a wise man would not have made, or a man of very nice honour have accepted; nor will this Court measure the degrees of understanding, and say, that a weak man, provided he is out of the reach of a commission, may not give as well as a wise man. But, though this Court disclaims any such jurisdiction, yet where a gift is immoderate, bears no proportion to the circumstances of the giver, where no reason appears, or the reason given is falsified, and the giver is a weak man, hable to be imposed upon, this Court will look upon such a gift with a very jealous eye, and very strictly examine the conduct of the persons in whose favour it is made; and if it sees that any arts or stratagems, or any undue means have been used—if it sees the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give an undue influence over him—if there be the least scintilla of fraud, this Court will and ought to interpose; and by the exertion of such a jurisdiction, they are so far from infringing the right of alienation, which is the inseparable incident of property, that

(a) 9 V. 292, 7 R. R. 195.

(c) Wilm. 70.

(b) 2 V. 627; Wilm. 58.

(d) Wilm. 6, 61.

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they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it.

The ground, as between guardian and ward, is put upon the danger, either of inducing guardians to flatter the passions of their wards, or of the improper exercise of their authority, as the relation of husband and wife is guarded from the effects both of indulgence and severity.

If this reasoning has any weight, does not the principle apply with infinitely greater force to the present case? What is the authority of a guardian, or even parental authority; what are the means of influence, by severity or indulgence, in such a relation, compared with the power of religious impressions under the ascendancy of a spiritual adviser; with such an engine to work upon the passions; to excite superstitious fears or pious hopes; to inspire as the object may be best promoted, despair or confidence; to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness: that good or evil, which is never to end? What are all other means to these? Are inferior considerations to have so much effect; and is no regard to be given to the most powerful motive that can actuate the human mind? Though no direct authority is produced, your Lordship, dispensing justice by the same rule as your predecessors, upon such a subject, not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide in a case, far the strongest that has occurred, upon this ground alone, from its infinite importance to the community.

November 23, 1807.

LORD CHANCELLOR ELDON.—With regard to the interests of the wife and children of the defendant, there was no personal interference upon their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt could be entertained, whether it is not competent to a Court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of

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others. The case of *Bridgman v. Green* (a) is an express authority, that it is within the reach of the principle of this Court, to declare that interests so gained by third persons, cannot possibly be held by them; and Lord *Hardwicke* observes justly, that if a person could get out of the reach of the doctrine and principle of this Court, by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud. In that instance, therefore, the interest of the son was considered as capable of being affected by the decree as the interest of the father. The case afterwards came before the Lords Commissioners; and Lord Chief Justice **WILMOT** expresses himself thus (b) :—

“There is no pretence that Green’s brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift: his partitioning and cantoning it out amongst his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it.”

This was also the doctrine of Lord *Thurlow*, in the case that has been referred to: *Luttrell v. Lord Waltham*, sometimes cited as *Dixon v. Olmies* (c); and, though it was not practically acted upon, Lord *Thurlow* was inclined to carry it farther. The object of that bill in that case was, that an estate should be enjoyed as if a recovery had been suffered, upon the ground that Luttrell had, while Lord Waltham was, upon his death-bed, engaged in suffering a recovery, prevented it with the view that the estate should devolve upon the person with whom he was connected. The estate was by the law vested in that individual, a much stronger case, therefore, than the acquisition of property through imposition. Lord *Thurlow*, whatever might have been his final decision upon that case, had no doubt that it was against conscience, that one person should hold a benefit which he derived through the fraud of another; and I have reason to know that his Lordship would not have discussed the case

(a) 2 V. 627; Wilm. 58.

(b) Wilm. 64.

(c) 1 Cox, 414.

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so much at large, if it had been no more than that. These plaintiffs, therefore, if entitled to relief against Baseley, are equally entitled against all the branches of his family.

Then, as to persons concerned in these transactions, I agree with the argument, that it is not upon the feelings which a delicate and honourable man must experience, hearing these instruments taken altogether, as I think myself bound to take them, nor upon any notion of discretion in this Court to prevent a voluntary gift, by a man stripping himself entirely of his property, if undue influence is not imputed, that any judge sitting here has ever thought himself at liberty to interpose. I agree, further, that the relief must proceed upon what is alleged and proved by the person complaining; that their complaints must be treated as effectual or ineffectual, according to what they have, not what they could have, represented: also, as to the defence, it may frequently happen that many passages may have taken place in the course of the transaction that are not brought into view; but the case must be dealt with as it is alleged and proved. I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached, if the situation of the parties had enabled them to go through all the difficulties as to amendment; also, that many circumstances might have been brought forward on behalf of the defendants, which I am bound not to look at; but taking the case as it stands, though there is in this bill much foul allegation, which, if not true ought not to be there, and a great deal of which is denied, and clearly disproved, there is enough upon the bill and in evidence, to show that this deed cannot stand, if the whole transaction, taken together, cannot stand.

This bill seeks relief only as to the deed of May, 1804. The deed of June relates to other estates; unquestionably has very different provisions, for very different persons: reserving a degree of dominion, and considerable dominion, to Mrs. Huguenin over that property; and I am disposed to think, that deed could not be made the subject of the same bill: at least, that it was not necessary to complicate this cause by making that a subject of the relief prayed. But the view I take of this case is this: that, attending to the effect of the letter, the evidence of the transactions among these parties, and attending more especially to the evidence of the attorney, the defence rests in a

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great measure upon this: that the Court is, by the nature of the defence, required to look at this deed, not merely by itself, but as being more or less justified with reference to the whole of the transactions, in the course of which it was executed; and it is much the same as if the defendant had said, he puts his case, not upon that instrument merely, but as part of a general arrangement of the plaintiff's affairs; and that the deed is to be considered with regard not merely to its own contents, but to the whole transaction, of which **this deed forms a part.**

The great body of evidence shows the alarm of this lady at the trouble of taking possession of an estate dilapidated. Upon the evidence, until November, 1803, she had no acquaintance whatsoever with Baseley. Her age was about forty. She had left in the West Indies a mother; had great regard for a female child, Mary Ann Elliott; and had also a natural half-brother, named Clarke, of the age of sixteen, in whose education she appears to have been much interested. She brought him over to England, placed him with Mr. Baseley at an expense to herself of 200*l.* a year. Her brother-in-law, Benjamin Hill, states, that he, previously to the introduction of Baseley, managed her concerns; and that, until after that introduction, she expressed her entire satisfaction with the care of the solicitors in whose hands her affairs in this kingdom were placed, which is confirmed by another witness. The bill charges Baseley with infusing into her mind great dissatisfaction with the management and the want of professional skill and care of those solicitors. The inference that this dissatisfaction was created in her mind by Baseley, is too strong; that she entertained that disaffection is clear: that Baseley did not discourage it, that he gave in to it, is in evidence: that he created it, I cannot say: that he participated in, **and acted upon it with her, is clearly established.**

In October, preceding the month of January when her affairs were taken out of the hands of those solicitors, her husband, who came with her to England, died. She lived with, or was frequently with the two brothers of her deceased husband. The answer, therefore, stating that she was not without friends in this country is material; but in this view only, that it could be supposed she had ever consulted with them. There is, however, no evidence, that either Baseley ever stated to them what she proposed to do, or that the

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attorney concerned in the transaction, as Lord Chief Justice *Wilkes* says, felt the obligation of talking both with the grantor and the grantee, before this proposition was carried into effect. Benjamin Hill, one of her brothers-in-law, laid aside all the business after the solicitors were discharged; and as to George Hill, though there is evidence that she did declare her purpose, it was in conversations, in which it was suggested to them both, and that ample provision was to be made for their children, which I fear had some influence with them. **No such provision, however, was made.**

It is doubtful, upon the report, whether Mrs. Huguenin had the immediate means of acting with the freedom of an affluent person. At the date of the report, the rents remained to be accounted for by Baseley, to the amount of 300*l.* or 400*l.* After the date of that report, small sums were lent to her: she had not even then paid the costs of the deed: she had borrowed 100*l.* from the attorney: and there is one item of 57*l.*, advanced by Baseley after June, 1804, to discharge her husband from an arrest. Certainly, therefore, she was not in a condition of immediate affluence. Under the influence of her dissatisfaction at the conduct of the solicitors, in January, 1803, either she adopted the resolution of dismissing them, and placing the whole management of all her concerns in the hands of Baseley, calling upon him to assist her in executing it, or it was suggested to her by Baseley. My opinion is, that the weight of the evidence, which does not agree upon this, is, that she called upon Baseley, and desired him to assist her in executing that purpose of her own. If the proposition was her own, yet the transaction, in a Court of justice, has this character at least, that it was demonstration to Baseley that she placed confidence in him, as high as one individual ever placed in another. Where the evidence is contradictory, the fairest way to the defendant is to take his own account: and his answer represents it thus, that she called and requested him to write a letter to the solicitors; and at her request he did, in her presence, with her sanction, and by her direction, write the form of a letter, which he believes she copied and sent to them; but he positively denies that it was written at his instigation or by his desire, and says he wrote it at her pressing desire; and though the language was his, the substance was hers. **Who dictated that letter is of very little importance.** If at her dictation he wrote it, and permitted her to

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send it, that is the most direct communication to him of the nature and extent of the confidence she placed in him; and the language of a Court of justice has in all times been, *that, if a man does not choose to act upon the confidence appearing in the course of the transaction to be so reposed in him, he ought to reject it as soon as proposed.* This letter is, therefore, upon the answer, to be taken as expressing her sentiments in his language. The effect of it is, at least, a communication to him of the information that she was unprotected by the death of her husband; that she wanted assistance for the purpose of advising her in the adjustment of her affairs; that she wanted that friend which Providence had raised up for the purpose of kindly interposing in seeing that her property was managed to the best advantage, and her affairs brought into such a plan that she could conduct them with facility to herself.

This letter produced from the solicitors, rather too hastily, a total severance of themselves from the concern; and Baseley entered, to a certain degree at least, upon the management of them. The purposes expressed and alluded to in that letter, cannot mean that all her estate should be given away; that she was to be enabled to conduct her affairs with facility by giving up all her title. The attorney, who states that he was satisfied that she had made up her mind as to all her affairs, prepared in June these two deeds, conveying this estate, worth at that time, at the lowest calculation, 420*l.* a year, which Annesley wished to purchase upon the supposition that it was worth 610*l.* a year, subject to a rent-charge to herself, with a term in trustees to secure it to Baseley for life; with remainders to Mrs. Baseley for life, and to all their children, born or to be born, and the ultimate limitation to Mrs. Huguenin. A deed was prepared at the same time, which appears intended to be a conveyance of all her property, but which they were very much perplexed to describe, conveying all her freehold estates in the West Indies and everywhere, none of the parties knowing what they were; all the leaseholds for lives mentioned in the schedule, of which there are none; and all the leaseholds for years, of which there are some, to her for her separate use for life; with remainders to the husband whom she should marry, surviving her, and to Mrs. Hindes, and young Clarke and his children; and the ultimate limitation, for what reasons is not explained, to Baseley and the attorney, and a person resident in the

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West Indies: this contemporaneous deed permitted to be made by her, having in contemplation a second marriage, which appears upon the deed itself.

To the question, whether these instruments being such as I have represented them, the consequence is that this Court shall undo them, I answer, no, *if they are the pure voluntary, well-understood acts of her mind*; but if they have not that character, if they are the result of her notion, that this is the true effect of that friendly assistance, that kind providential interference to which she was looking for the management of her affairs with advantage and facility to herself; if the conveyance was executed under the effect of that, which has always been considered in this Court as undue influence, if the deeds themselves, which are the best evidence, demonstrate, and if they are confirmed by extrinsic evidence that they are not the pure, well-understood acts of her mind, this Court will undo them.

Has an instance ever occurred that a person, situated as this lady, was permitted to execute such instruments as these, with a purpose of marriage demonstrated upon one of them, and having a mother, and other persons whom she regarded with affection and anxiety for their welfare in life? Lord *Hardwicke* reasons with great force as to the voluntary deed, upon the same principle which induced me to ask, how it happens that there is no power of revocation in this instrument. There was in that deed a power of revocation: but it was a power to revoke in the presence of three persons, who, perhaps never could be got together, which was therefore considered as if there had been no power of revocation; and the want of such power was considered strong evidence that the party did not understand the transaction, whence arose a strong inference of an undue purpose. There is in this case an attempt to show why there was not a power of revocation; and that is a part of the transaction one of the most liable to objection. The evidence and answer of the attorney go to this distinctly, that she informed him she was to have all her affairs arranged. He was struck with the circumstance of her making an irrevocable deed, and told her that she should make a will. When she said that this was to be a permanent arrangement, is it too much to say the attorney permitted himself to be surprised into an act depriving her of her property for the benefit of Baseley's family, and for no provident or wise purpose fettering all her other property by

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the various limitations in the other deed? I do not say instruments are to be set aside by the want of great delicacy in the person who prepared them; but I am bound to look at all the circumstances that led to the execution of a voluntary instrument, and to observe that the attorney did not state this improvident act to the brother of this lady, or, as Lord Chief Justice *Wilmut* says, (a), go and talk both to the grantor and grantee upon it. What she said to him must have suggested to him a reason for resisting more strenuously. The Court cannot pay attention to such circumstances as are alleged upon this part of the case.

The deed, being drawn by the attorney, was laid before a conveyancer, and the simple question put was, whether a fine and recovery were necessary. Why that should be thought of I do not know, as she had the remainder in fee simple vested in possession. Some observation occurs upon the contents of that instrument. Her annuity of 400*l.* is merely reserved, payable quarterly, not secured by any personal obligation. The three trustees and the rent-charge are left in blank before the deed was laid before counsel, and the filling up those blanks is left to Baseley and herself; and the power of changing the trustees does not depend upon her pleasure, but is only given in the cases of inability or refusal to act. The reason that there is no power of revocation is, that the gentleman before whom the draft was laid thought his business was to execute the intention of the parties. There is a difference of opinion upon that, other gentlemen thinking some observation necessary. Upon the instructions for the other deed, however, they do not intimate that there is to be any power of revocation, or that she is to have any power to alter the uses. Not a word is dropped upon the subject. But by that deed this lady who was so shocked at the notion of having a provision that was not to be permanent, has the power of making a deed or will to alter completely these uses. Is there any evidence showing why that power should be there?—a power not to revoke the uses, but much less convenient, yet open to all the objections that she could have to a temporary instrument, as not binding herself down.

Other observations occur upon these instruments. This latter

(a) *Wilm.* 69.

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deed, in the limitation as to all the estates, provides an interest to a husband surviving, and to her children. According to the instructions, as to all the money property (and they settle property in the funds, though there was none), they omit the provision for the husband and children, which, however, they thought they had inserted, as there is, afterwards, a provision upon failure of children. Another circumstance as to the instrument of the 21st of June, 1804, is that the instructions as to the trustees' names mention Baseley, the attorney, Sleet, and Anderson; and the insertion of Anderson is material. It is proved that she frequently visited him, and he is named as a trustee; but his name is afterwards struck out. Clearly, at the time of the instructions, it was not intended that there should be an ultimate limitation to the trustees for their own use; but they were to be trustees for undefined purposes. The deed was originally drawn so expressing the trust to be for such uses as they should think necessary and proper, but that was afterwards struck out, and the use for the benefit of the trustees themselves substituted.

It does not rest there. Suppose these transactions entirely separate. Proposing to put under the fetters of these limitations all her considerable West India and other property, for the purposes of facility of management, and putting it out of her own reach, she is permitted to place her West India property under the care of a clergyman and an attorney in England, and a person resident in the West Indies. The power of management is certainly stated to be for her life, subject to her control; how efficacious, every one knows, without any control whatsoever after her death. The management is perfectly *ad libitum*, to lease and carve out of the estates other interests; and they have all discretionary powers as to the children, Mary Elliott, and Clarke; and she could not change any of the trustees without executing that power which it is supposed she had determined not to have.

If such is the nature of these deeds and the defendant, according to the letter that is in evidence, permitted her to suppose that he was to take the management for her benefit, without considering what an agent engaged for reward can do, the known doctrine is, that the fruit of that relation, if it was not absolutely dissolved, cannot be permitted to subsist. Then, was the relation dissolved? Look at

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the transactions from the date of the letter to the end of the year : possession taken, and her anxious wish that Baseley should be the occupier, proved : her satisfaction expressed at seeing the house repaired ; her declarations that she could not possibly think of undertaking that trouble ; and that it was with exultation and satisfaction, as some of the witnesses express it, that she got rid of the estate : that it was no object to her : that she had so much property, it was a subject of delight to her that Baseley was to occupy that which was given to him. Take it that she intended to give it to him, it is by no means out of the reach of the principle. *The question is not whether she knew what she was doing, had done, or proposed to do but how the intention was produced ; whether all that care and providence was placed round her, as against those who advised her, which, from their situation, and relation with respect to her they were bound to exert on her behalf.* Her situation, with reference to pecuniary circumstances during the whole period, must also be attended to, her husband, a few weeks before, having been relieved from distress by a sum of money advanced by Baseley.

In that view of the case, no evidence out of these instruments could satisfy me that Mrs. Huguenin understood them. I believe, further, that the parties to the transaction did not understand it. Repeating therefore, distinctly that this Court is not to undo voluntary deed, I represent the question thus—whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature, and consequences, which the defendants Baseley and the attorney were bound by their duty to communicate to her, before she was suffered to execute them : and though, perhaps, they were not aware of the duties which this Court required from them in the situation in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle, it is necessary to impute knowledge which the party may not actually have had. These parties, therefore, cannot possibly hold the benefit of these instruments.

As to the costs, the same principles of public utility that require me to decree that these instruments shall be delivered up, compel me to make that decree at the cost of the defendant. As to ordering the deeds and papers to be delivered up, I have not, upon this form

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of the bill, authority to examine here the contents of the rest of the attorney's bill of costs, who, by happening to be engaged in a transaction that cannot be maintained, would not lose his lien upon the papers with reference to other transactions. If, however, Mrs. Huguenin ought not to have been permitted to execute the deed I am bound by the principle established in *Bridgman v. Green* (a), and other cases, to hold, that if an attorney thinks proper to do more than obey the instructions which he ought not to have permitted to take effect, the Court has frequently said that it is not sufficient, and if he has not only carried into execution an intention which he ought not to have permitted to take effect, but has also taken to himself an advantage with respect to the property, persons not being consulted who ought to have been consulted (alluding to the ultimate limitation to the trustees), it deserves serious consideration whether he shall not pay the costs if the other cannot. It, however, these papers are to be delivered up on payment of the attorney's bill, he cannot be permitted to charge for drawing instruments which the decree says ought not to have been executed.

One circumstance now occurs to me, which I shall notice, that it may not be supposed to have escaped me. If there is anything like consideration, it is the consideration that arises out of the circumstances that Baseley would repay and lay out money upon the estate. If that had been expressed, it would have amounted to so little, as valuable consideration, that the Court would not have been justified in paying much attention to it; but I cannot find in any of these cases in which a deed has been affected on account of undue influence, that the Court has ever attended to anything supposed merely to oblige the parties, if not expressed.

NOTES.

1. Generally, p. 266.
2. Where undue influence is presumed from the relation between the parties, p. 269.
3. Where there is no special confidential relationship between donor and donee, p. 281.
4. How far the court will interfere as against third parties, p. 283.
5. Delay, acquiescence, confirmation, p. 286.
6. Gifts by will, p. 287.

(a) 2 V. 627; Wilm. 58.

Huguenin v. Baseley.**1. Generally.**

Huguenin v. Baseley is a leading case on the jurisdiction of equity, to set aside, upon the principle of general public policy, voluntary donations "inter vivos," obtained by persons standing in some confidential, fiduciary, or other relation towards the donor, in which dominion may be exercised over him. Other instances of constructive fraud dealt with in these volumes are, fraud upon marital rights, *Stratton v. Jones*, see "Husband and Wife"; fraud upon a power, *Allyn v. Belcher*, see "Powers"; purchase by a trustee from his *cestui que trust*, *Fox v. Mankrell*, see Trusts (Constructive).

The word "Constructive" negatives *actual* fraud, but affirms that the actual conditions will have similar consequences (*a*). Constructive fraud includes that vast number of cases in which transactions are disallowed, not on account of any evil design or contrivance to perpetrate a positive fraud or injury upon other persons, but because they are contrary to some general public policy, or to some fixed artificial policy of the law (*b*). "Fraud, in my opinion, is a term that should be reserved for something dishonest and morally wrong, and much mischief is, I think, done, as well as much unnecessary pain inflicted by its use where 'illegality' and 'illegal' are the really appropriate expressions" (*c*).

"The relief," says Lord Coltham (*d*), "as Sir Samuel Romilly says in his celebrated reply in *Huguenin v. Baseley*, from the hearing of which I received so much pleasure that the recollection of it has not been diminished by the lapse of more than thirty years, the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another:" "The obtaining of property, or of any benefit, through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character" (*e*).

Courts of Equity will not, however, arrest or set aside an act or contract merely because a man of more honour would not have entered into it. They do not sit as *custodes morum*, enforcing the

(*a*) Pollock, *Contracts* (1894), p. 504.

(*b*) See Story's *Eq. Jur.* (1892), pp. 166, 167.

(*c*) Per *Wills, J.*, *Re Companies Acts*, 21 Q. B. D. p. 309; and see judgment

of *Kay, J.* in *Fry v. Lane*, 40 C. D., p. 324.

(*d*) *Dent v. Bennett*, 4 My. & C. 277.

(*e*) Per the C. A. in *Moxon v. Payne*, 8 Ch., p. 887.

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strict rules of morality. But they do sit to enforce what has been called a technical morality. If confidence is reposed it must be faithfully acted upon, and preserved from any admixture of imposition. If influence is acquired it must be kept free from the taint of selfish interest, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good (a).

Lindley, L.J., in his judgment in *Allcard v. Skinner* (b), thus classifies the cases in which equity invalidates voluntary gifts, pointing out that the two groups often overlap.

(1). Cases in which there has been some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor (c).

(2). Cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift was made to him.

The question in the second group of cases is not whether the donor knew what he was doing, had done, or proposed to do, but how the intention was produced: Whether all that care and providence was placed around him, as against those who advised him which, from their situation and relation with respect to the donor, they were bound to exercise in his behalf (d).

In the cases which belong to the second group, it is the duty of the donee to advise and take care of the donor, and where there is no such duty the language of Lord *Eldon* ceases to be applicable (e).

(a) Cf. Story, Eq. Jur. (1892), § 308 et seq.; Pollock, Contracts (1894), p. 579; Moncreiff on Fraud (1891), p. 291; Seton (1893), p. 1945.

(b) 36 C. D., p. 181.

(c) Norton v. Relly, 2 Eden, 286; Nollidge v. Prince, 2 Gif. 246; Lyon v. Horne, 6 Eq. 655; Whyte v. Mead, 2 Ir. Eq. 420, all belong to this group.

And see Morley v. Loughlan, (1895) 1 Ch. 736.

(d) See judgment of *Lindley, L.J.*, in *Allcard v. Skinner*, 36 C. D., p. 182. Citing with approval from the judgment of *Eldon, C.*, in the principal case.

(e) *Lindley, L.J.*, *Allcard v. Skinner*, 36 C. D., p. 182.

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"To protect people from being forced, tricked, or misled in any way by others into parting with their property, is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny, and with the infinite varieties of fraud" (a).

But where a gift is made to a person standing in a confidential relation to the donor, the Court will not set aside the gift, if of a *small amount*, simply on the ground that the donor had no independent advice; otherwise if the gift is so large as not to be accounted for on the ground of friendship, charity, &c. (b).

What amounts to Undue Influence.—"As no Court has ever attempted to define fraud (c), so no Court has ever attempted to define undue influence, which includes one of its many varieties" (d). It will be a question for the Judge to decide, upon the circumstances of each particular case, and such circumstances as the non-intervention of a disinterested person, or professional adviser on the behalf of the donor, especially if the donor is, from age or weakness of disposition, likely to be imposed upon (e), the statement of a consideration, where there was actually none (f); the absence of a power of revocation (g); the improvidence of the transaction (h), furnish a probable though not always a certain test of undue influence or fraud (i).

Sir F. Pollock, in his work on the Law of Contracts, thus states the equitable doctrine on this subject: "Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction and all the circumstances of the case, appears to have been such as to preclude the exercise of free and a deliberate judgment, is considered by Courts of Equity, in

(a) Per *Lindley, L.J.*, *Allcard v. Skinner*, 36 C. D., p. 183.

(b) *Rhodes v. Bate*, 1 Ch. 235; *Allcard v. Skinner*, supra, p. 183.

(c) See the numerous definitions of fraud given in *Moncreiff on Fraud*, 1891, p. 28.

(d) Per *Lindley, L.J.*, *Allcard v. Skinner*, 36 C. D., p. 183.

(e) *Griffiths v. Robins*, 3 Madd. 191; *Dent v. Bennett*, 4 My. & C. 273; *Harvey v. Mount*, 8 B. 439;

Page v. Horne, 11 B. 227; *Dutton v. Thompson*, 23 C. D. 278.

(f) *Hawes v. Wyatt*, 3 Bro. Ch. 156; *Gibson v. Russell*, 2 Y. & C. C. 204; *Sharp v. Leach*, 31 B. 491.

(g) *Coutts v. Ackworth*, 8 Eq. 558; *Wollaston v. Tribe*, 9 Eq. 44; *Everett v. E.*, 10 Eq. 405; *Lyon v. Home*, 6 Eq. 655.

(h) *Harvey v. Mount*, 8 B. 439.

(i) *Phillips v. Mullings*, 7 Ch. 244; *Hale v. H.*, 8 Ch. 430; *Armstrong v. A.*, 8 Ir. R. Eq. 1.

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respect of gifts 'inter vivos,' to be undue influence, and is a ground for setting aside the act procured by its employment" (a).

2. Where Undue Influence is presumed from the Relation between the Parties.

Where a relation of confidence is shown to exist, or is presumed from the position of the parties, then the law on grounds of public policy presumes that the gift was the effect of influence induced by these relations, and *the burden lies on the donee* to shew that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances (b). And although the donor is of full age and capable of managing his affairs, and the gift is made without proof of any actual exercise of power or influence, and although as a fact no unfair advantage is taken of him, and no undue influence is brought to bear upon him by the donee, and although the gift is not for the private advantage of the donee, but for legitimate purposes, for which it has been used, yet the Court, from the special relationship which exists between the parties, will infer the existence of influence, and in the case of large gifts, not to be reasonably accounted for on the ground of friendship, relationship, &c., will throw upon the donee the burden of supporting the gift, by proving that the donor had, or could have had if he had wished it, independent advice, and was free to act upon it when given (c).

In the following special relations (Parent and Child, Husband and Wife, &c., &c., *infra*), influence is presumed (d). But this is not an exhaustive enumeration, but is intended for the purpose of illustration. The Court has declined to fetter the rule by any enumeration of the description of persons against whom it ought to be freely used (e). The principle upon which equity will give relief as against the persons standing in the following special relations to

(a) Pollock, Contracts (1894), p. 580, and see as to wills, *infra*, p. 287, "Gifts by Will."

(b) See *Hunter v. Atkins*, 3 M. & K. 135; *Cooke v. Lamotte*, 15 B. 241; judgment of *Wright, J.*, in *Morley v. Loughnan*, (1893) 1 Ch., p. 752; *Wright v. Vanderplank*, 8 De G. M. & G. 136; *Rhodes v. Bate*, 1 Ch. 252; *Parfitt v. Lawless*, L. R. 2 P. &

D. 462; *Liles v. Terry*, p. 275, *infra*.

(c) See judgment of *Cotton, Lindley*, and *Bowen, L.JJ.*, in *Allcard v. Skinner*, 36 C. D. 145, *passim*; *Archer v. Hudson*, 7 B. 351; *Rhodes v. Bate*, 1 Ch. 252.

(d) See *Parfitt v. Lawless*, L. R. 2 P. & D. 462.

(e) Per *Cottenham, C.*, in *Dent v. Bennett*, 4 My. & C. 262.

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the donor, will be extended and applied to all the variety of relations in which domination may be exercised by one person over another (a). In these cases the age or capacity of the donor, or the nature of the benefit are of little importance. The point is, had he independent and competent advice? (b). When such a relation is established, the Court will presume its continuance unless its determination is distinctly proved (c).

Parent and Child and persons in loco parentis.—In *Carpenter v. Herriot* (d), where a father having advanced a child in his infancy, upon his coming of age took a bond from him to a greater amount than the sums advanced, and which it appears the son was totally unable to pay, Lord Keeper *Healey* held that the bond was obtained by parental influence, and decreed that it should not stand as a security for the sums advanced, but be set aside altogether. “If,” said his Lordship, “a bond be given with advice and deliberation, this Court will not set it aside for the obligor, but if a man gives a voluntary bond for more than he is able to pay, the transaction speaks weakness on the one side, and a sort of imposition on the other” (e).

The same principles are applicable to a person obtaining a voluntary gift, who has put himself *in loco parentis* towards the donor. Thus, in the case of *Archer v. Hudson* (f), a niece, two months after she came of age, and after her guardians had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up, and who was considered by the Court as standing *in loco parentis*. *Lampdale*, M.R., set aside the security. “Nobody,” observed his Lordship, “has ever asserted that there cannot be a pecuniary transaction between a parent and child,

(a) Per *Cottonham*, C., in *Dent v. Bennett*, 4 My. & C. 262. And see *Smith v. Kay*, 7 H. L. Cas. 750; *Tate v. Williamson*, 1 Eq., p. 536; 2 Ch., p. 61.

(b) *Rhodes v. Bate*, 1 Ch. 252.

(c) *Ibid.* Commented on in *Mitchell v. Homfray*, 8 Q. B. D. 592; and see *Tate v. Williamson*, 2 Ch. 61.

(d) 1 Eden, 338.

(e) See also *Cocking v. Pratt*, 1 V. 401; *Wright v. Vanderplank*, 8 De G. M. & G. 133; *Potts v. Surr*, 34 B. 543, 552; *Davies v. D.*, 4 Gif. 417; *King v. K.*, 3 Jur. (N. S.) 609, 611;

Chambers v. Crabbe, 34 B. 457; *Blunden v. Barker*, 1 P. W. 639; *Young v. Peachy*, 2 Atk. 254, 258; *Glissen v. Ogden*, cited 2 Atk. 258; *Heron v. H.*, 2 Atk. 167; *Hawes v. Wyatt*, 3 Bro. Ch. 156; *Hoghton v. H.*, 15 B. 278; *Meadows v. M.*, 16 B. 401; *Bury v. Oppenheim*, 26 B. 594; *Turner v. Collins*, 7 Ch. 329, 342; *Jenner v. J.*, 2 De G. F. & J. 359; *Baker v. Bradley*, 7 De G. M. & G. 497; *Savery v. King*, 5 H. L. Cas. 627; *Bellamy v. Sabine*, 2 Ch. 425.

(f) 7 B. 551.

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the child being of age ; but everybody will affirm in this Court that, if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child; and that it is the business and the duty of the party who endeavours to maintain such a transaction, to show that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, **independent altogether of any sort of control" (a).**

If the transaction between parent and child is reasonable, and entered into with good faith, equity will not interfere, as in *Blackburn v. Edgeley (b)*. And so where the dealing between them is of the nature of a family arrangement, as when a father prevails upon a son, tenant in tail under a settlement, to take an estate for life only, with remainder to his first and every other son, the transaction will not be set aside upon the suggestion of the father's having an undue influence over him (c). So, if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted, though there might be something of that sort, yet, if the agreement be reasonable, the Court will not set it aside (d).

In regarding claims to set aside a re-settlement of family estates the Court regards considerations which would otherwise not be allowed. And it is not essential when the son is tenant in tail in

(a) And see *Grosvenor v. Sherratt*, 28 B. 659; *Sharp v. Leach*, 10 W. R. 878; *Rovett v. Harvey*, 1 S. & S. 502; *Hottmar v. Metropolitan, &c. Bank*, 1 Hem. & M. 641; *Smith v. Kay*, 7 H. L. Cas. 772; *Wright v. Vanderplank*, 8 De G. M. & G. 133, 146; *Maitland v. Backhouse*, 16 Si. 58; *Potts v. Surr*, 34 B. 543; *Savery v. King*, 5 H. L. Cas. 627; *Baudrigge v. Brown*, 18 C. D. 188.

(b) 1 P. W. 600, 606; cf. *Firmin v. Pulham*, 2 De G. & Sm. 99.

(c) *Tendril v. Smith*, 2 Atk. 86; *Jenner v. J.*, 2 De G. F. & J. 359.

(d) *Cory v. C.*, 1 V. 19; *Hartopp v. H.*, 21 B. 259; see, as to family arrangements, *Stapilton v. S.*, note, p. 242, *supra*; *Meadows v. M.*, 16 B. 401; *Baker v. Bradley*, 2 Sm. & G. 531; *Jenner v. J.*, 2 De G. F. & J. 359.

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remainder that he should have independent advice, and the Court will not inquire whether the influence of the father was exerted with more or less force. And even if the father obtains a benefit is it necessarily unfair, and even if unfair the whole settlement will not be avoided (a).

Husband and Wife.—This is one of the confidential relationships enumerated by Lord Penzance in *Parfitt v. Lawless* (b).

Guardian and Ward.—"Where," says Lord Hardwicke, "a man acts as guardian, or trustee, in the nature of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward or *cestui que trust* coming of age, and at the time of settling accounts or delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery or force—by good usage unfairly meant, or by bad usage imposed—to take such an advantage. And, therefore, the principle of the Court is of the same nature with relief in this Court, *on the head of public utility*: as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brokage bonds. All depends *upon public utility*; and, therefore, the Court will not suffer it, though, perhaps, in a particular instance, there may not be *any actual unfairness*. * * * The rule of the Court as to guardians is extremely strict, and in some cases does infer some hardship: as where there has been a great deal of trouble, and the guardian has acted fairly and honestly; and yet he shall have no allowance. But the Court has established that on great utility and on necessity, and on this principle of humanity, that it is a debt of humanity, that one man owes to another, as every man is liable to be in the same circumstances (c). A gift from a ward to a guardian will be the more readily set aside, if, at the time of its being made, the guardianship accounts are not all settled, or the ward's property is retained by his guardian (d).

(a) *Hoblyn v. H.*, 41 C. D. 201, *supra*, p. 244; see *Fane v. F.*, 20 Eq. 698; *Turner v. Collins*, 7 Ch. 329. Cf. *Dutton v. Thompson*, 23 C. D. 278; *Chesterfield v. Janssen*, p. 314, *infra*.

(b) 2 P. & D. 462.

(c) *Hylton v. H.*, 2 V. 549; see *Maitland v. Backhouse*, 16 Si. 58; *Hatch v. H.*, 9 V. 292, 7 B. R. 195.

(d) *Pierce v. Waring*, 1 P. W. 121,

Cox's note; S.C., cited 2 V. 549; *Hylton v. H.*, 2 V. 547. And see *Dawson v. Massey*, 1 Ball & B. 219, where a lease granted to a guardian, and *Aylward v. Kearney*, 2 Ball & B. 463, where leases granted to a guardian's son were set aside. See and consider *Cray v. Mansfield*, 1 V. 379; *Wood v. Downes*, 18 V. 127; *Wright v. Proud*, 13 V. 136; *Thornber v. Sheard*, 12 B. 589.

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And such transactions will be set aside after a considerable lapse of time, when the donor has not been a free agent. Thus in *Hatch v. H.* (a) a guardian, who was incumbent of a living, obtained from his ward, soon after she came of age, a conveyance of the advowson of the living expressed to be made in consideration of her great friendship, kindness, and regard for him, the care taken of her by him, &c.; and of 10s. to his brother, who was the attorney who prepared the deed, and one of the attesting witnesses, and who afterwards became her husband. She continued to live with her guardian for about four years afterwards, when she married her guardian's brother; and sixteen years after her marriage, upon the death of her guardian, she and her husband filed a bill to be relieved against the conveyance. *Ellen, C.*, considering that she had never been her own mistress, being with her guardian till her marriage, and with her husband since, notwithstanding the time which had elapsed, and taking into consideration the nature of the property, ordered the instrument to be delivered up to be cancelled; but as the husband was *particeps criminis*, the order was made without costs.

In *The Duke of Hamilton v. Mohan* (b) the duke being about to marry, entered with great deliberation into marriage articles, one of which was, that he should, within two days after the marriage, release his intended wife's mother, who was her guardian, of all accounts of the mesne profits of the estate. *Cooper, C.*, admitting that there had been no surprise, held, that the covenant to make such release ought to be set aside, as it seemed to be extorted from the duke by one who had a power over the young lady as a parent, which ought not to have been made use of in that manner; that it was as if the mother should say, 'You shall not have my daughter unless you will release all accounts;' and that, to tolerate such an agreement would be paving a way to guardians to sell infants under their wardship; and the greater the fortune was, the greater would be the temptation to treat in this manner with the guardian.

So a voluntary settlement made by a female ward soon after she came of age, under the influence of her guardian, and without the advice of an independent solicitor, and the effect of which was to deprive her of the control over her own property, was set aside as improvident, especially as no power of revocation (c) was reserved (d).

(a) 9 V. 292, 7 R. R. 195.

Phillips v. Mullings, 7 Ch., p. 247;

(b) 1 P. W. 118.

James v. Couchman, 29 C. D., p. 217.

(c) See *Woolaston v. Tribe*, 9 Eq. 44;(d) *Everitt v. E.*, 10 Eq. 405.

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The principle applies also to any person assuming the office and functions of a guardian although not legally so constituted (a).

Where, however, the influence, as well as the legal authority of the guardian over the ward, has completely ceased, and the ward has been put into possession of his property, after a full and fair settlement of accounts, equity will not interfere to set aside a reasonable gift to the guardian. See *Hylton v. H.* (b), *Hatch v. H.* (c), where Lord Eldon says, "There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the *cestui que trust*, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given."

Trustee and Cestui que trust.—Much the same principles apply as in the above-mentioned relations of parent and child, and guardian and ward (d).

A trustee, moreover, cannot bargain with his *cestui que trust* for a benefit, and it has even been laid down that a *cestui que trust* cannot give a benefit to his trustees (e).

Legal Adviser and Client.—Courts of equity have always acted strictly up to this rule, that a solicitor can, by act *inter viros*, take nothing for his own benefit from his client *pending a suit*, save his demand, or indeed at any time while the connection between them subsists, with the influence attending it: for though the transaction be as righteous as ever was carried on, it is the settled law, that the connection must, as in the case of guardian and ward, be *bond fide* dissolved, before he can take anything beyond his regular fees (f).

(a) *Griffin v. De Vaullo*, 3 P. W. 131; *Hylton v. H.*, 2 V. 547.

(b) 2 V. 549.

(c) 9 V. 296.

(d) See *Hatch v. H.*, 9 V. 192, 7 R. R. 195; *Ellis v. Barker*, 7 Ch. 104; *Tate v. Williamson*, 1 Eq., p. 536.

(e) *Vaughton v. Noble*, 30 B. 39.

(f) *Proof v. Hines*, Cas. t. Talbot, 116; *Gibson v. Jeyes*, 6 Ves. 266, 5 R. R. 295; *Walmesley v. Booth*, 2 Atk. 25; *Drapers' Company v. Davis*, 2 Atk. 295; *Oldham v. Hand*, 2 V. 259; *Wright v. Proud*, 13 V. 136; *Hatch v. H.*, 9 V. 292;

Welles v. Middleton, 1 Cox, 112; 4 Bro. P. C. 245; *Newman v. Payno*, 2 V. jun. 199; *Hatch v. H.*, 9 V. 296, 7 R. R. 195; *Wood v. Downes*, 18 V. 120; and *Strachan v. Brandon*, there cited, p. 127; *Moore v. France*, 9 Ha. 299; *Re Ingle*, 21 B. 275; *Walker v. Smith*, 29 B. 394; *Re Holme's Estate*, 3 Gif. 337; *O'Brien v. Lewis*, 4 Gif. 221; *Tomson v. Judge*, 3 Drew. 306; *Gardener v. Ennor*, 35 B. 549; *Morgan v. Minott*, 6 C. D. 638; W. N. 1877, p. 153; *Morgan v. Green*, *Ibid*; *Tyars v. Alsop*, 59 L. T. R. 369.

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In *Liles v. Terry* (a) the plaintiff made a voluntary conveyance of leasehold premises to the defendant, John F. Terry, upon trust for herself for life, and after her death upon trust for her niece, the wife of the defendant Terry, for her separate use absolutely. The plaintiff was a spinster of seventy-seven years of age. The defendant, J. F. Terry, had acted as her solicitor in respect of certain litigation about the property conveyed, and the plaintiff had promised that if he would so act without charge she would leave his wife the property. On an action to set aside the deed, *Charles, J.*, held there was nothing to show undue influence or unprofessional conduct; that the plaintiff had had the matter fully explained to her; and that the deed carried out her intention; and gave judgment for defendants. The C. A. reversed the judgment, holding that as the confidential relation existed, it was impossible to rebut the presumption of undue influence, unless the donor had competent and independent advice; and that a gift to the wife stood on the same footing as a gift to the solicitor himself. And a solicitor having the conduct of a suit, may not purchase the subject-matter of it (b).

Where, however, there was no cause pending, and it was proved that there was no undue influence exercised by the attorney, a gift to him has been held valid (c).

A voluntary conveyance to counsel by the client, expressed to be in consideration of the services of counsel, will be set aside on the ground of public policy (d).

Whenever a professional man is called upon to give his services to his client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences to result therefrom, and requires that he should distinctly and clearly point out to his client all those consequences from whence a benefit may arise to himself from the instrument so prepared; and if he fail to do so, a Court of equity will deprive him of it. In *Segrave v. Kirwan* (e) a barrister drew a will for a friend, and was made executor, in which character he became entitled to the personal estate; he was held, however, by *Hart, C.*, to be a trustee for the next of kin (f).

And it has moreover been expressly decided, that the relation of

(a) (1895) 2 Q. B. 679.

(b) *Simpson v. Lamb*, 26 L. J. Q. B. 121; *Davis v. Freethy*, 24 Q. B. D., p. 523; and see *Luddy's Trustee v. Peard*, 33 C. D. 884; and *James v. Kerr*, 40 C. D. 449.

(c) *Oldham v. Hand*, 2 V. 259; and see *Harris v. Tremble*, 15 V. 51.

(d) *Brown v. Kennedy*, 33 B. 133; 4 Do G. J. & S. 217.

(e) Beat. 157.

(f) See also *Bulkley v. Wilford*, 2

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counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation (a). But agreements between a solicitor and his client for the remuneration of the former are now valid, subject to the conditions imposed by the under-mentioned Act (b).

Religious Influence—"The equitable doctrine of undue influence (in gifts 'inter vivos') has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud (c). The influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of equity have gone very far" (d). "Equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit directly or indirectly by the gifts which the donor makes under, or in consequence of, such influence unless it is shown that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside—the means of considering his worldly position and exercising an independent will about it. This is not a limitation placed upon the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play" (e). In *Allcard v. Skinner* (f) plaintiff A., being about thirty-five years of age, was introduced in 1868 by her spiritual adviser N. to the defendant S., who was the superior of a sisterhood of which N. was the spiritual adviser and confessor. In 1870 A. became entitled to certain

Cl. & Fin. 102; *Nanney v. Williams*, 22 B. 452; *Corley v. Stafford*, 1 De G. & J. 235; *Ex p. Collins*, 2 Ir. Ch. Rep. 618; *Garrett v. Wilkinson*, 2 De G. & Sm. 244; *Clark v. Girdwood*, 7 C. D. 9; *Cockburn v. Edwards*, 18 C. D. 449, 455; *Pooley's Trustees v. Whet- ham*, 33 C. D. 111.

(a) *Kennedy v. Broun*, 13 C. P. (N. S.) 677; *Robertson v. Macdonough*, 6 L. R. Ir. 433.

(b) The Attorney and Solicitors Act, 1870, s. 4; *Pontifex v. Farnham*, 41 W. R. 238; *Re Stuart*, (1893) 2 Q. B. 201; *Re Thomas*, (1893) 1 Q. B. 670; *Re Thompson*, (1894) 1 Q. B. 462; and see as to Court having jurisdiction to

set aside agreement, *Re Jones*, (1895) 2 Ch. 719; affirmed by O. A., (1896) 1 Ch. 222. The Solicitors' Remuneration Act, 1881, s. 8; *Re Palmer*, 43 C. D. 291; *Davis v. Free- thy*, 24 Q. B. D., p. 523; *Re Drucro*, 94 L. T. Jo. 583; *Re Frape*, (1893) 2 Ch. 284; *Re Lewis*, 1 Q. B. D. 724; *Re West, King & Co.*, (1892) 2 Q. B., p. 106.

(c) Per *Lindley, L.J.*, *Allcard v. Skinner*, 36 C. D., p. 183. See as to gifts by will, *infra*, p. 287.

(d) *Ibid.*

(e) Per *Bowen, L.J.*, *ibid.*, p. 190.

(f) 36 C. D. 145.

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property both as tenant for life and absolutely, she became a postulant in the same year, and made a will leaving all her property to defendant S. She then became a novice, and in 1871 she became a professed member of this society, and took the vows of poverty, chastity, and obedience. During the period in which she was a professed member of the society, from August, 1871, to May, 1879, she made over to defendant S. sums amounting to upwards of 5,000*l.*, all of which, except about 1,000*l.*, were spent for the purposes of the society. The sum of 1,000*l.* remained in the hands of S. In May, 1879, she left the society and immediately revoked her will, but made no claim for the return of her property until March, 1885, and did not issue the writ in the action until August, 1885.

The C. A. (Cotton, Lindley, and Bowen, LJJ) held, *dissentient*: Cotton, L.J., affirming the decision of Kekewich, J., that under the circumstances the plaintiff had, by her conduct *after she was free from all influence* from D. or S., *confirmed* the gifts, and was barred therefore from obtaining the relief to which she would otherwise have been entitled. The C. A. found as a fact, that no pressure, except the inevitable pressure of the vows and rules, was brought to bear on the plaintiff; that no deception was practised upon her; that no unfair advantage was taken of her; that none of her money was obtained or applied for the private advantage of N. or S., or for any purpose other than the legitimate purposes of the sisterhood (*a*), nor was there any actual exercise of power or influence over her in respect of these gifts, either by N. or by S., apart from that necessarily incidental to their position in the sisterhood (*b*). Everything done by the plaintiff was in the opinion of the Court referable to her own willing submission to the vows she took, and to the rules which she approved. Nevertheless the Court held that these gifts were in fact made under a pressure which whilst it lasted she could not resist, and were therefore not past recall when that pressure was removed. If in 1879, when she was emancipated from the spell by which she was bound, she had invoked the aid of the Court to recover the money in the hands of S., she would have been entitled to its aid (*c*). There was no proof in this case that the plaintiff, at the time these gifts were made, had an opportunity of obtaining free and independent advice, and knew that she might have obtained such advice if she wished for it, and there was a rule against consulting externs which

(*a*) See judgment of Lindley, L.J.,
Allcard v. Skinner, 36 C. D., p. 179.

(*b*) Ibid., p. 183.

(*c*) See pp. 186 and 191.

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pointed the other way: and even if such proof had been given, *Lindley, L.J.*, doubted if the gifts could have been supported without further proof that she was free to act on the advice which might be given to her (a).

In *Morley v. Loughnan (b)*, the defendant L., a man of no means, was a member of a religious sect known as the Plymouth Brotherhood. This sect was divided into two orders, open brethren and exclusive brethren, and L. belonged to the exclusive order. In 1881 L. was employed as travelling companion to M., a person of large fortune, subject to epileptic fits, never physically or mentally strong, morbidly religious and easily influenced, but still not incapable of managing his own affairs. M. was at this time about thirty years old, was a member of the open order of Plymouth Brethren, and resided on his own estate. In 1883 he invited himself to stay with L., and from that time until his death in 1891, he, except for short intervals, continued so to reside, giving up his own home. During this period he became converted by L. to his own order of exclusive brethren; he was in a low and morbid condition, he made large payments to L., not requiring any accounts to be furnished to him; he placed his banking account at his disposal, and he made a series of wills in L.'s favour, and the aggregate amount obtained by L. from M. was 140,000*l.* In 1891 M. died by his own hand, bequeathing the remainder of his property to his brothers and sisters. In the same year the executors of his will commenced this action against L. to recover the 140,000*l.* as having been obtained by undue influence. L. had given certain sums, part of this money, to his brothers and brother-in-law, and these persons were subsequently made defendants for the purpose of making them liable to the extent of the gifts received by them. The Court (*Wright, J.*) held that the money was obtained by the exercise and abuse of personal influence and ascendency established and maintained for that very purpose under a cover of religion and religious brotherhood, that the gifts were not the result of M.'s own free will but the effect of that influence and domination. Further, that the case came also within the rule laid down by *Bowen, L.J.* in *Allford v. Skinner (c)* as to fiduciary relationship, and that as to 50,000*l.*, part of the 140,000*l.*, which the Court held was given for furthering certain religious works, L. was liable on another ground, for as he had received it for a definite

(a) Page 184.

1944, F. 3.

(b) (1893) 1 Ch. 736; Seton (1893), p.

(c) 36 C. D. 145.

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purpose, he could not repudiate that purpose and claim to keep it for his private and selfish ends. The Court also held that the claim must succeed against the other defendants, citing with approval the judgment of *Eldon, C.* in the principal case (*a*).

In *Norton v. Rolly* (*b*) a grant of an annuity obtained by a dissenting minister having a spiritual ascendancy over a woman under a state of religious delusion, was set aside upon principles of public policy (*c*).

In *Huguenin v. Baseley* the donation was set aside, it seems, not merely on the ground of the spiritual ascendancy and undue influence obtained by the defendant over the mind of the plaintiff, Mrs. Huguenin, but also on the ground of his having abused the confidence placed in him by her, as an agent managing her affairs (*d*).

In *Lyon v. Home* (*e*) Mrs. Lyon, a widow, aged seventy-five, within a few days after seeing one Home, who claimed to be a "spiritual medium," was induced from the belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of Home, to adopt him as her son, to transfer 24,000*l.* to him; to make her will in his favour; afterwards to give him a further sum of 6,000*l.*; and also to settle upon him, subject to her life interest, the reversion of 30,000*l.* These gifts were made without consideration, and without power of revocation. It was held by *Giffard, V.-C.*, that the relation proved to have existed between them implied the exercise of dominion and influence by Home over Mrs. Lyon, and, consequently, that as Home had failed to prove that these gifts were the pure, voluntary well-understood acts of Mrs. Lyon's mind, they must be set aside (*f*).

Medical Attendant.—In *Dent v. Bennett* (*g*) a gift obtained by a medical attendant from his patient was set aside by Lord *Cotton* in the

(*a*) *Supra*, p. 255.

(*b*) A decision of Lord *Northington's*, 2 Eden, 286.

(*c*) See also *Nottidge v. Prince*, 2 Gilf. 246; and see and consider *Kirwan v. Cullen*, 4 Ir. Ch. Rep. 322; *Maccah v. Hussey*, 2 Dow & Cl. 440. See as to the validity of gifts from nuns to their convents, *Whyte v. Meade*, 2 Ir. Eq. Rep. 420, referred to but distinguished by *Cotton, L. J.*, in *Allcard v. Skinner*, *supra*; *Fulham v. Macarthy*, 1 H. L. Cas. 703; or to

trustees for religious purposes, *Re Metcalfe's Trusts*, 2 De G. J. & S. 122, as to which, see article in 10 Jur. (N. S.), p. 91.

(*d*) See *Middleton v. Shorburne*, 4 Y. & C. 390, 391; *Moxon v. Payne*, 8 Ch. 881, 887.

(*e*) 6 Eq. 655.

(*f*) See *Seton* (1893), p. 1942, F. 3. See also *Gibson v. Russell*, 2 Y. & C. C. C. 104; *Fowler v. Wyatt*, 22 B. 232, 237.

(*g*) 4 My. & C. 262.

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who held that medical attendants were undoubtedly within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy, but he declined to "run the risk of in any degree fettering the exercise of the beneficial jurisdiction of the Court by any enumeration of the description of persons against whom it ought to be most freely used."

In *Mitchell v. Homfray* (a) the executors of Mrs. G., a widow, sought to recover a sum of 800*l.* from defendant, who had acted as her medical attendant. In 1871, Mrs. G. was living at Gaintord, and gave the defendant, her medical attendant, two cheques for 500*l.* and 300*l.*, to buy a house. Defendant alleged the gift was made in pursuance of the wish of Mrs. G.'s husband, and that he the defendant had agreed to pay and had paid Mrs. G. an annuity of 40*l.* for her life. In 1882 Mrs. G. went to live elsewhere and the relation ceased, but she survived for three years. The case was tried before a jury, and on a new trial before a special jury they found that the advance of the 800*l.* was a gift; that there was no undue influence; that the relation of patient and medical adviser came to an end a year after the gift; that *after such determination of the relationship, and after any effect produced by it had been removed, Mrs. G. had conferred the gift.* It was admitted that Mrs. G. had not received any independent advice when the gift was made, and that defendant was at that time her medical adviser. The Court entered judgment for defendant, and the **C. A. upheld the judgment (b).**

Other Instances of Special Relationship.—Where a widower married the sister of his deceased wife, it was held by *Campbell, C.*, that the relation thus constituted imposed upon the widower claiming the benefit of a settlement made on him by his wife's sister, the onus of showing that at the time of entering into the transaction she was fully, fairly, and truly informed of its character and of her legal *status* (c).

The influence of a man over a woman to whom he is engaged to be married is presumed to be so great, that the Court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used (d).

(a) 8 Q. B. D. 587.

(b) Cf. *Pratt v. Barker*, 4 Russ. 507; *Wright v. Froud*, 13 V. 180; *Tyars v. Alsop*, 59 L. T. R. 369.

(c) *Coulson v. Allison*, 2 De G. F. & J. 521.

(d) *Page v. Horne*, 11 B. 227, 235, 236; *Cobbett v. Brock*, 20 B. 524;

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So, the undue influence of an elder over a younger sister has been deemed fatal to the validity of a voluntary settlement in favour of the former. In *Hurrey v. Mount (a)*, a voluntary settlement by a younger sister of the whole of her present and future property principally in favour of her eldest sister, was set aside upon the same principle as the transaction in the principal case, viz., that the eldest sister had obtained great ascendancy and influence over the younger sister, and was allowed to assume the management of *all* her affairs; the circumstances of the transaction moreover being open to suspicion, the settlement being very improvident, and the younger sister not having had the benefit of independent professional advice (b).

In *Rhodes v. Bate (c)* a person who acted as agent was held to occupy such a confidential relationship, and as to an officer and subaltern just of age see *Lloyd v. Clark (d)*. As to the position in this respect of the promoter of a company, see the judgment of Lord Penzance in *Erlanger v. New Sombrero, &c. Co. (e)* and Sir F. Pollock's note thereon (f).

In *Wheeler v. Sargeant (g)* an executor before probate obtained a gift from a beneficiary. The plaintiff had no competent or independent advice, and the Court held that his position alone as executor without any words of pressure yet amounted in fact to pressure, and ordered restitution of the gift.

3. Where there is no Special Confidential Relationship between Donor and Donee.

In cases where the intimate relations before-mentioned do not exist between the donor and donee, fraud or undue influence *must be proved* against the donee in order that the gift may be set aside (h).

Livesy v. Smith, 15 C. D. 655; *James v. Holmes*, 31 L. J. (N. S.) Ch. 567.

(a) 8 B. 439.

(b) And see *Osmond v. Fitzroy*, 3 P. W. 129, and note; *Bridgman v. Green*, 2 V. 627; *Wiln.* 58; *Sharp v. Leach*, 31 B. 491.

(c) 1 Ch. 252.

(d) 6 B. 309.

(e) 3 App. Cas., p. 1230.

(f) Pollock, *Contracts* (1894), p. 583.

(g) 3 R. 663.

(h) See *Hunter v. Atkins*, 3 My. & K. 113; *Beanland v. Bradley*, 2 Sm. & G. 339; *Blackie v. Clark*, 15 B. 595; *Toker v. T.*, 31 B. 629; *Smith v. Kay*, 7 H. L. Cas. 750; *Allcard v. Skinner*, 36 C. D., p. 171; and see *Moncreiff*, *Fraud* (1891), p. 291; *Pollock*, *Contracts* (1894), p. 584, commenting upon *Highton v. H.*, *Cooke v. Lamotte*, 15 B. 234; *Phillips v. Mullings*, 7 Ch. 244; *Rees v. De Bernardy*, 12 Times L. R. 412.

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And in such cases the age or capacity of the donor and the nature of the benefit are material (a).

Where a man induces a person of weak intellect and improvident habits to execute a settlement without independent legal advice and without understanding it, or knowing the amount of the property settled, or the effect of the settlement, it will be set aside, even although the execution of the settlement was not procured by any unworthy motives, but with the object of protecting the settlor against his own improvidence (b).

One party may acquire undue influence over another by operating on his fears, as for instance in *Williams v. Bayley* (c), in which case a son had taken to his and his father's bankers promissory notes purporting to be indorsed by his father. The son had forged the indorsements. The bankers at an interview which took place between them, the son, the father and the father's solicitor, said in effect to the father (d), "We have the means of prosecuting and transporting your son. Do you choose to come to his help and take on yourself the amount of his debts—the amount of these forgeries? If you do, we will not prosecute; if you do not, we will." The father thereupon executed an agreement to mortgage his property to the bankers, and the forged notes were given up to him. Two questions arose in the action brought by the father to set aside this agreement: was the plaintiff a free and voluntary agent, or did he give the security in question under undue pressure exerted by the defendants? Was the transaction independently of pressure illegal (e)? As to the first point Lord Westbury said: "A contract to give security for the debt of another which is a contract without consideration, is above all things a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous position, or of taking on himself the amount of that civil obligation." And the decree setting aside the security was upheld on both grounds (f).

(a) *Rhodes v. Bato*, 1 Ch. 252.

(b) *Dutton v. Thompson*, 23 C. D. 278; *Smith v. Kay*, 7 H. L. Cas. 759; cf. *Chesterfield v. Janeson*, *infra*; *Ellis v. Barker*, 7 Ch. 104; *Grosvenor v. Sherratt*, 28 B. 659.

(c) 1 L. R. H. L. 200, explained in

Flower v. Sadler, 10 Q. B. D. 572.

(d) See judgment of *Cranworth, C.*, in *Williams v. Bayley*, p. 212.

(e) See judgment of Lord Westbury, *id.* p. 216.

(f) See *McClatchie v. Haslam*, Seton, 1893, p. 1942, F. 2; *Davies v. London*,

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An appointment made in exercise of a power by a wife in favour of her husband will be considered good, unless the wife or other persons impeaching the instrument show that it was executed under circumstances sufficient to invalidate it, and the evidence of one of the witnesses that the wife was agitated and distressed and signed the deed in a reluctant manner, has been held to be insufficient (*a*).

In the absence of any fiduciary relation, such as that of guardian and ward, between the donor and donee, and also of any undue influence on the part of the latter, an infant may make a donation of any chattels or personal property in his actual possession (*b*).

"There are endless variations of the fiduciary position which do not fall under any strictly defined head. Some of those relations are continuing, others temporary; but in all the question is, whether the person parting with property by way of gift, or entering into a contract, had a full and free opportunity of judging for himself (*c*)."

The principle on which relief is given applies to all cases where influence is acquired and abused, and confidence reposed and betrayed (*d*).

Inadequate Consideration.—Mere inadequacy of consideration is by itself merely evidence of fraud or undue influence, but when coupled with other circumstances, such as weakness of mind (*e*), illness and ignorance (*f*), poverty (*g*), may have the effect of showing that the vendor was not a free and reasonable agent, and may throw the burden on the purchaser of showing the contract was fair (*h*).

4. How far the Court will Interfere as against Third Parties.

An interest obtained by undue influence, as Lord *Eldon* decided in the principal case, cannot be held by third parties, although innocent of fraud. "Whoever receives the gift, must take it tainted and

&c. *Marine Insurance Co.*, 8 C. D., p. 473; *Boyse v. Rossborough*, 6 H. L. Cas. 2; *Lound v. Grimwade*, 39 C. D. 605.

(*a*) *Nedby v. N.*, 5 De G. & Sm. 377, 384.

(*b*) *Taylor v. Johnston*, 19 C. D. 603, 608.

(*c*) *Moncreiff on Fraud* (1891), p. 293; and see *Tato v. Williamson*, 2 Ch. 55; *Fox v. Mackreth*, 1 Bro. Ch. 424, 2 R. R. 55, post; *Eden v. Ridsdales, &c. Co.*, 23 Q. B. D. 368; gift

by promoter to director.

(*d*) *Smith v. Kay*, 7 H. L. Cas. 750.

(*e*) *Longmate v. Ledger*, 4 De G. F. & J. 402.

(*f*) *Clark v. Malpas*, 31 B. 80; *Baker v. Monk*, 33 B. 419; cf. *Ross v. De Bernardy*, 12 Times L. R. 412.

(*g*) *Fry v. Lane*, 40 C. D. 312.

(*h*) See *Moncreiff on Fraud* (1891), p. 294; *Pollock, Contracts* (1894), p. 596. As to catching bargains with heirs, see *Chesterfield v. Janssen*, post.

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infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it (a)."

And *Wright, J.*, cited this passage with approval in *Morley v. Loughnan* (b), holding the brothers and brother-in-law of the defendant equally liable with the defendant to the extent of the sums which they had received from him.

Where persons, having notice of the undue influence which one party has power to exercise over another, combine with the former party in order to obtain an advantage for themselves, the transaction will be set aside. Thus, where a creditor obtains a security from a person likely to be under the influence of his debtor, as, for instance, in the case of a son or younger brother of the debtor's just come of age, the *onus* will lie upon the creditor of showing that such person understood the transaction, and that he did not act under any undue influence, otherwise the transaction will be set aside (c).

So in *Maitland v. Irving* (d), *Irving and Brown*, who were partners as coal-merchants, consented to postpone the payment of 3,000*l.* due to them from *Maclea*n, in consideration of his procuring and giving the guarantee of the plaintiff, *Miss Maitland*, for that sum; and *Maclea*n at the same time informed *Irving and Brown* that *Miss Maitland* was his niece, and was possessed of considerable property; that she had resided with him for some time, that he had been her guardian, and that she had been of age about a year and a half. Afterwards, another arrangement was made between *Irving and Brown* and *Maclea*n in pursuance of which *Irving and Brown* delivered up the guarantee, and *Maclea*n procured and gave them the plaintiff's cheque for 3,000*l.* and her promissory note for 1,200*l.*, as securities for his paying them those sums. *Shadwell, V.-C.*, granted and afterwards continued an injunction, restraining *Irving and Brown* from prosecuting an action against the plaintiff to recover the 3,000*l.*; and notwithstanding they had obtained a verdict, he refused to

(a) *Per Wilmot, C.J.*, in *Bridgman v. Green*, *Wilm.* 58, 64. And see *Godard v. Carlisle*, 9 *Price*, 169; *Scholarfield v. Templor*, *John.* 153; *Smith v. Kay*, 7 *H. L. Cas.* 750; *Bainbrigge v. Brown*, 18 *C. D.*, p. 197.

(b) (1893) 1 *Ch.*, p. 757; p. 278, *supra*.

(c) *Berdoe v. Dawson*, 34 *B.* 608; *Baker v. Bradley*, 7 *De G. M. & G.* 597; *Sercombe v. Sanders*, 34 *B.* 382; cf. *Rhodes v. Bate*, 1 *Ch.* 252.

(d) 15 *Si.* 437.

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order the money to be paid into Court. "The case," said his Honor, "has been argued for the defendants as if it were a case in which they had some ground to resist the rule in equity, because of their not being volunteers. But no consideration whatever was given to the young lady; on the contrary, she was induced to do the act upon an application made to her by a person, who, if he had performed his duty, would have advised her not to do that which he applied to her to do. She was influenced by him, or, at least, allowed by him, to give this very guarantee, which was a direct benefit to all the defenders (Maclean was a defendant), in the situation in which they then stood with respect to each other. The facts of the case seem to me to amount to this: that Irving and Brown, knowing the defenceless situation of the young lady, combined with Maclean, who disclosed it to them, in order that advantage might be taken of her defenceless situation, for the benefit of all the three. And my opinion is, that they must all three be considered as standing in the same situation. It is most necessary to consider the transaction in this view, because it is the foundation of the whole case; for, what subsequently took place was nothing more than a substitution of the note and the cheque for the guarantee" (a).

Where, moreover, a gift of property has been obtained by the exercise of undue influence, a purchaser for value subsequently taking with notice of the equity thereby created, or with notice of the circumstances from which the Court confers the equity, will be bound thereby (b).

The principles, however, laid down in the cases before mentioned are not applicable to the case of a *bona fide* purchase without notice. Thus in *Blackie v. Clark* (c), a married woman having separate estate, joined with her trustee, who was her confidential medical adviser, in granting annuities secured on her separate estate for his benefit. Upon her filing a bill to set them aside as against the grantees, it was held by *Romilly, M.R.*, that the burden of proving their invalidity was on her, and as it appeared that she understood the transaction, and that no undue persuasion or coercion had been proved, the annuities could not be impeached.

In *Corbett v. Brock* (d), a debtor induced a lady, to whom he was

(a) And see *Maitland v. Backhouse*, 571; *Kempson v. Ashbee*, 10 Ch. 16 Si. 58; *Archer v. Hudson*, 7 B.551; 15.

Espey v. Lake, 10 Ha. 261; *Dettmar v. Metropolitan and Provincial Bank (Limited)*, 1 Hem. & M. 641; *Rhodes v. Bate*, 1 Ch. 252; *W. v. B.*, 32 B. 197.

(b) *Bainbrigge v. Browne*, 18 C. D.

(c) 15 B. 595.

(d) 20 B. 524.

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engaged to be married, to become security for a debt. After the marriage she insisted that she had been imposed upon. It was held by *Ronally*, M.R., that the only duty of a creditor (who was aware of the relation between the parties) towards the lady was to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice, did not affect his security. "The fact of the intended husband saying, 'I am about to marry a lady who will give you security,' does not amount to notice to them that this security could only be obtained by undue influence (a)."

And it seems that although a deed may be valid in respect to purchases without notice of undue influence, as for instance, that of the father over his child as plaintiff in an action, it may at the same time be declared that so far as the father is concerned the deed is not binding in any way on the plaintiff (b).

It will be observed that in the principal case, the solicitor who prepared the deeds which were set aside as obtained by undue influence having been made a party to the suit, Lord *Eldon* observed that it deserved serious consideration "whether he should not pay the costs if the other defendant could not (c)."

5. Delay, Acquiescence, Confirmation.

Delay in asserting rights cannot be in equity a defence unless the plaintiff knows his rights (d). In *Allcard v. Skinner* (e), more than six years had elapsed since the influence had ceased, and the action was commenced, and following the analogy of the Statute of Limitations in actions for money had and received, such delay would be a very material element for consideration (f). And although delay is not a bar in itself, it is a fact to be considered in determining whether there has been an election on the part of the donor to confirm the gift (g).

(a) See *Cooke v. Lamotte*, 15 B. 234; *Hoghton v. H.*, 15 B. 278.

(b) *Bainbrigge v. Browne*, 18 C. D. 188, 199.

(c) See *Baker v. Loader*, 16 Eq. 49; *Beadles v. Burch*, 10 Si. 332; *Harvey v. Mount*, 8 B. 439; but see *Clark v. Girdwood*, 7 C. D. 9.

(d) Per *Cotton*, L.J., in *Allcard v. Skinner*, 36 C. D., p. 174; *Wright v. Vanderplank*, 8 De G. M. & G. 133, where the action to set aside a

deed was not brought until 10 years after its execution.

(e) *Supra*.

(f) See judgment of *Lindley*, L.J., in *Allcard v. Skinner*, 36 C. D., p. 186; *Smith v. Clay*, 3 Bro. Ch. 639 (n.); *Hovenden v. Annesley*, 2 Sch. & L. 607, 630. And see *Tyars v. Alsop, &c.*, 39 L. T. R. 369.

(g) See judgment of *Bowen*, L.J., *Allcard v. Skinner*, 36 C. D., pp. 191-193.

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In cases of this kind there can be no acquiescence until the donor knows his rights and is free from the influence, but ignorance of his rights which is the result of deliberate choice is no answer to a defence of laches and acquiescence. It is enough for the donee to show that the donor knew he might have rights, and being a free agent at the time, deliberately determined not to inquire what they were or to act upon them (a). And see *infra*, pp. 324-326.

6. Gifts by Will.

The rules of equity in relation to gifts *inter vivos*, by which fraud is presumed when they are obtained from persons standing in certain relations to the donors, are not applicable to gifts by wills (b). "To be undue influence in the eye of the law there must be—to sum it up in one word—coercion. * * * It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence" (c). But the rule would seem to be wider than this; coercion or fraud must be proved, *e.g.* misrepresentations as to the character of the natural objects of the testator's bounty (d). The influence of a person standing in a fiduciary relation to the testator may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent (e); and the burden of proof of undue influence (f) lies upon those who assert it (g). But "there is one rule which has always been laid down by the Courts having to deal with wills, and that is that a person (h), who is *instrumental in the framing of a will*, and who

(a) See judgment of *Kekewich, J.*, and of *Lindley and Bowen, L.JJ.*, in *Allcard v. Skinner*, *supra*; and see *Lindsay Petroleum Co. v. Hurd*, L. R. 1 P. C., p. 239; *Wright v. Vanderplank*, 8 Do G. M. & G. 133; *Stump v. Gaby*, 2 Do G. M. & G. 623; *Wollaston v. Tribe*, 9 Eq. 44; *Jarratt v. Aldam*, 9 Eq. 463; *Turner v. Collins*, 7 Ch. 342; *Moxon v. Payne*, 8 Ch. 88; *Kompeon v. Asbee*, 10 Ch. 15; *Mitchell v. Homfray*, 8 Q. B. D. 587.

(b) See *Parfitt v. Lawless*, 2 P. & D. 462; *Ashwell v. Lomi*, 2 P. & D. 477.

(c) Per Sir *J. Hannen*, in *Wingrove v. W.*, 11 P. D., p. 82.

(d) *Boyse v. Rossborough*, 6 H. L. Cas. 48; *Allen v. McPherson*, 1 H. L.

Cas. 207; *Hindson v. Wetherill*, 5 Do G. M. & G., p. 343.

(e) See *Wingrove v. W.*, 11 P. D. 81; and judgment of Lord *Pentance*, *Parfitt v. Lawless*, 2 P. & D., p. 469.

(f) See *Wingrove v. W.*, *supra*.

(g) *Boyse v. Rossborough*, *supra*; *Theobald on Wills* (1893), p. 22, citing *Hindson v. Wetherill*, 5 Do G. M. & G. 301; *Walker v. Smith*, 29 B. 394; and *Parfitt v. Lawless*, *supra*; *Pollock, Contracts* (1894), p. 533 (n.).

(h) ? A person who has no special claim on the testator's bounty, see judgment of Lord *Hatherley*, *Fulton v. Andrews*, 7 L. R. H. L., p. 469. See also *Tyrrell v. Painton*, (1894) P., p. 159.

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obtains a bounty by that will, is placed in a different position from other ordinary legatees, who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator, and that he was of sound mind and memory, and capable of comprehending it. But there is a farther *onus* upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the *onus* of showing the righteousness of the transaction (*a*). In *Hegarty v. King* (*b*), it was held that a person propounding a will prepared by himself without assistance of any third person, and under which he takes a benefit, is bound to give clear and convincing evidence that the testator knew and approved of the clause under which he took a benefit, and that this principle applied even in the case of a near relative of the testator, and in the absence of such evidence, probate of that portion of the will may be refused, and granted of the remainder.

If proved that the instrument contains something induced by fraud, and therefore not the testator's will, this, if severable from the rest, may be struck out by the Probate Court and the will proved without it (*c*). The jurisdiction rests with the Court of Probate. The Chancery Division will not interfere and declare the legatee a trustee where this would amount to a decision on appeal from the Probate Court (*d*), though it will where the gift is in accordance with the testator's intention, but the legatee is bound by a secret trust (*e*); and as to cases where the old Court of Chancery would declare a legatee trustee, see *Allen v. Macpherson* (*f*).

(*a*) Per Lord Hatherley, *ibid.*, pp. 471, 472; cf. *Donnelly v. Broughton*, (1891) A. C. 435; *Tyrrell v. Pounton*, (1894) P. 151.

(*b*) 7 L. R. Ir. 18.

(*c*) *Rhodes v. R.*, 7 App. Cas. 198; *Hindson v. Wetherill*, 5 De G. M. &

G. 301; *Harter v. H.*, L. R. 3 P. & D. 20; *Allen v. Macpherson*, 1 H. L. Cas. 209.

(*d*) *Meluish v. Milton*, 3 C. D. 27.

(*e*) See *Boyes v. Carritt*, 26 C. D. 531.

(*f*) 1 H. L. Cas., p. 262.

EARL OF CHESTERFIELD *v.* SIR ABRAHAM
JANSSEN (*a*).

1750—1. 2 V. 125 (*b*).

Post Obit Securities—Catching Bargains with Heirs Expectants and
Reversioners—Confirmation.

A., aged thirty, borrows 5,000*l.* from B., upon the security of a bond in the penalty of 20,000*l.*, conditioned for payment of 10,000*l.* if A. survived C., his grandmother, from whom he had great expectations, but not otherwise. A. survived C. a year and eight months, and soon after her death executed a new bond in the penalty of 20,000*l.*, conditioned for payment of 10,000*l.* to B., which he gave to B. on his delivering up to him the former bond to be cancelled.

A bill being filed by the executors of A. to be relieved against the latter bond, as given upon a usurious contract, and an unconscionable bargain, the Court was of opinion that the contract was not usurious, and, without giving any opinion whether the transaction was such as the Court ought to relieve against, as an unconscionable bargain with a person dealing with his expectancy, held, that the acts of A., after the decease of his grandmother, amounted to a confirmation of the original transaction, and gave relief only against the penalty of the last bond.

THE state of the case upon the pleadings and proofs, as far as was material for the consideration of the Court, was shortly this. John Spencer, in 1738, being possessed of an income of 7,000*l.* per annum, and of a personal estate in plate, jewels, and furniture, to a great value, and having contracted a debt to the amount of 20,000*l.* to several persons, mostly tradesmen, by whom he was pressed, and which he was desirous to pay off, proposed to borrow money, and particularly a sum of 5,000*l.* for that purpose.

(*a*) For other cases of constructive fraud, see *Fox v. Mackreth*, post, Purchase by a trustee; *Aloyn v. Belchier*, post, Fraud on a power; *Strathmore v.*

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Bowes, post, Fraud on marital right.

(*b*) S. C., 1 Atk. 301; 1 Wils. 286.

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As he had a well-grounded expectation of a great increase of fortune on the death of his grandmother, the Duchess of Marlborough, if he survived her, he resolved to contract thereon. He was above thirty originally of a hale constitution, but impaired, and, although afterwards he lived more regularly, yet he was addicted to several habits prejudicial to his health, which he could not leave off. She was seventy-eight, of a good constitution for her age, and careful of her health.

He sent to a market a proposal, which he supposed would easily meet with a purchaser, as it was natural to expect, in common course, that his grandmother should die first, though she was a good old life, and he but a bad young one. This proposal was, that if any one would lend him 5,000*l.* he would oblige himself to pay 10,000*l.* at or soon after the death of his grandmother, if he survived her, but to be totally lost if she survived him. This was rejected by several knowing persons as not sufficiently advantageous, as it was at first by the defendant, but afterwards accepted by him, and a bond of 20,000*l.*, conditioned to pay 10,000*l.*, was given on those terms.

(a) The Duchess of Marlborough died the 18th of October, 1744, and in the month of December following, on the defendant's delivering to Mr. Spenceer the bond above mentioned to be cancelled, he executed a new bond, whereby he became bound to the defendant in the penalty of 20,000*l.*, conditioned for payment to the defendant of 10,000*l.*, with lawful interest, on the 19th of April then next, and at the same time executed a warrant of attorney to empower a judgment to be recorded against him in the King's Bench, at the defendant's suit, for the said 20,000*l.* on the said bond. The defendant, by virtue of the said warrant of attorney, caused a judgment to be made out on the said bond against Mr. Spenceer, at the defendant's suit, for the said 20,000*l.*, to be recorded in the King's Bench of Hilary Term next ensuing the date of the said bond.

In the month of December, 1745, the defendant, by the invitation of Mr. Spenceer, being with him at his house at Windsor, he, on the 14th of that month, gave the defendant a bill for 1,000*l.* on Hoare and Company, in part of the defendant's debt, and on the 21st of March following sent the defendant 1,000*l.* more by his steward.

(a) This statement between brackets, is taken from 1 Atk. 301.

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On the 19th of June, 1746, Mr. Spencer died, but before his death made his will, and after payment of his debts and legacies, gave all the residue of his personal estate to be at his son's disposal: the present Mr. Spencer, provided he left no younger child, and appointed the plaintiffs to be guardians of his son, and also executors in trust for him during his minority.

The executors of Mr. Spencer, finding his specialty debts were very considerable, and that such as were upon simple contracts only, which likewise amounted to a very large sum, would receive but little satisfaction through the deficiency of the testator's assets, after payment of such sums as were really and *bonâ fide* due on specialties, brought a bill to be relieved against the defendant's demand, as being an unconscionable one, charging that the condition stipulated by his security was absolute and independent of any other contingency than that of a grandson of thirty years of age surviving a grandmother of eighty; and as the period or point of time limited for the payment (which was in one month after the death of the duchess) could not, by reason of her great age and infirmities, be removed to any great distance, but was every day approaching, and in fact happened soon after, so the requiring such a large sum as 10,000*l.* for the forbearance of 5,000*l.* for so short a time, being at the proportion of 200*l.* for every 100*l.*, was a most usurious contract, and such as will never meet with the approbation or countenance of a Court of equity, especially where the demand is made upon the assets of an insolvent person, to the prejudice and defeating of his other just and honest creditors, and of an infant heir and residuary legatee; and that the executing a new bond to the defendant after the death of the Duchess of Marlborough, is only a continuance of the former transactions, and partook of the original fraud; and that, being an unrighteous and usurious bargain in the beginning, nothing which was done afterwards could help it; but on the contrary, defendant, on acquiring such new security and judgment, and thereby seeking to conceal the true transaction, did, as far as in him lay, add to the first fraud, and ought to be restrained from taking out execution on his judgment till the Court have first inquired into and determined upon the fraud, and therefore, it is prayed, that the defendant may be adjudged by

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the Court to be a creditor of Mr. Spenceer, only for such sums as he shall appear to have *bonâ fide* advanced, with interest from the time of advancing the same, after deducting what he hath received; and that he may be decreed to come in, and receive a satisfaction for the residue of such principal sums only, and interest *patri passu* with Mr. Spenceer's other creditors, according to the nature of his demand; and for an injunction to stay his proceedings at law till the hearing of the cause.

July the 21st, 1747, the injunction was continued upon the merits till the hearing.]

Mr. Nod, Mr. Clarke, Mr. Wilbraham, and Mr. Crowle, for the plaintiffs.—This case is of great importance to the estate of Mr. Spencer, but of greater to the public. The bill is to be relieved against an exorbitant, unconscientious demand, on the known terms in a Court of equity, payment of principal really advanced, and legal interest. There are three general points to be determined. First, how that contract would have stood if properly brought in judgment in a Court of law, and considered merely upon legal principles? Next, what the fate of it ought to be, in a much stronger degree, in a Court of equity, when examined by principles of equity? Lastly, the subsequent transactions relied upon in the answer as a ratification of the original bargain.

As to the first, it is not good in point of law, and therefore usurious (*a*).

As to the second point: Courts of equity, not being tied up to rules, consider questions of this kind in a more extensive manner, and in general have avoided laying down any particular rule, as that would (like old statutes of usury) teach persons how far they might safely go, but declare, that wherever there is a spark of oppression—the motive on one side, necessity to apply for money, on the other, a covetous passion for undue lucre—they always relieve; not, indeed, setting it aside, but by giving what is really due. The following cases were cited upon this point:—*Waller v. Dalt* (*b*), which was intro-

(*a*) The laws against usury are now abolished, 17 & 18 Vict. c. 90; 24 & 25 Vict. c. 101, and therefore such parts of the case as relate thereto are omitted.
(*b*) 1 Ch. Ca. 276.

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ductive of *Barny v. Beuk* (a), *Berny v. Pitt* (b), *Birney v. Tison* (c), *Batty v. Lloyd* (d), *Nott v. Hill* (e), *Ardylasse v. Muschamp* (f), *Twistleton v. Griffith* (g), *Curwyn v. Milner* (h), *Larley v. Hooper* (i). It is on the principle of public utility that Courts of equity have gone further than the law. So, from the general inconvenience, premiums for places are not allowed, because there the office falls to the man, not that he is fit for it, but the office fit for him. So in *Hall v. Potter* (k), *Shepley v. Woodhouse* (l). No proof of fraud or undue advantage is requisite: the case speaks for it, and otherwise it would be saying, the Court will not relieve at all, as to such secret transactions witnesses are not called in. It is unjust and unreasonable, and in that light a Court of equity calls it a fraud, arising from avarice on one side and distress on the other: and will relieve on the same principles as in *Sir Thomas More's Case* (m); and see *Bosanquet v. Dashwood* (n), *Twistleton v. Griffith* (o).

As to the *third* point, all the other acts of Mr. Spencer were, when under the like circumstances, as originally, proceeding from his inability to do more. His acquiescence cannot be considered a ratification, but may be excused by his looking on it as a debt of honour and a sort of wager. The bond and judgment are an evidence he could not pay; he would go as far as possible; no money could be raised but by annual rents, whereas an immediate payment was to be made; and the borrower is a servant to the lender: *Curwyn v. Milner* (p), *Wiseman v. Beake* (q), *Ardylasse v. Muschamp* (r).

Mr. Attorney-General (Sir Dudley Ryder), and Mr. Solicitor-General (Mr. Murray), for the defendant.—This is indeed a matter of importance, being a question whether a man's own act, without fraud, in full senses, and having the absolute disposal, shall bind him

(a) 2 Ch. Ca. 136.
 (b) 2 Vern. 14.
 (c) 2 Vent. 359.
 (d) 1 Vern. 141.
 (e) 1 Vern. 167, 271.
 (f) 1 Vern. 237.
 (g) 1 P. W. 310.
 (h) 3 P. W. 293, n.
 (i) 3 Atk. 278.

(k) Show. P. C. 76, 1 Eq. Ca. Abr. 89.
 (l) 2 Atk. 535.
 (m) 1 Vern. 465.
 (n) Cas. t. Talbot, 40.
 (o) 1 P. W. 310.
 (p) 3 P. W. 293, n.
 (q) 2 Vern. 121.
 (r) 1 Vern. 237.

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If (as has been argued) there was no other way in which the Court could assist the preservation of families from ruin, it is better the law should be wrong in itself than uncertain. So far as a Court of equity can prevent such destruction by general rules, it will lay down such rules, but will not endeavour to preserve a weak or wicked man; nor say that by the rules of equity an honest and wise man cannot be protected in his honesty and wisdom. The question of law must arise out of the fact; the particular question of equity must depend on the fact also, considered under all its extensive circumstances, taking in the convenience and inconvenience, but still the ground to go upon must be made out by evidence. It will hereby be shown **that this is a fair, honest, and honourable contract.**

The circumstances come under these heads—first, the character, situation, and figure of life of the obligor; secondly, the same as to the obligee; thirdly, the motive or reasonableness thereof, inducing the obligor to solicit such a bargain; fourthly, the manner of transacting and concluding; fifthly, the fairness and equity of the price, from the chance, under all the circumstances, according to the probability at the time and the event, that has happened; sixthly, the opinion the obligor always had of this.

As to the *first*, it is material in all cases. His understanding is not charged by the bill to be weak, or likely to be imposed on, or that he was imposed on. He was turned of thirty—(in *Wiseman v. Beake* (a), the plaintiff, an expectant heir, was nearly forty, and a proctor)—no heir of any sort, in which the term is applied in these subjects; for if one, living with his father, is considered as heir (although *nemo est heres viventis*) he had no father, but was himself father of a family: he was in no state of quarrel with any relations; known never to have gamed, which, it is proved, he hated; and he had given up some former extravagances, and lived more temperately; was his own master, possessed of a fine family seat, with furniture suitable to his rank and figure; 7500*l* per annum for life, besides present personal estate, contingent reversions, and hopes from his grandmother. The pressure on him for his debts of 20,000*l*. (it appears not how contracted) was from tradesmen. Justice obliged him to pay them; it would be scandalous not to do so, and prudence

(a) 2 Vern. 121.

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required it, lest it might alter his grandmother's opinion of him. He must have paid this by the annual profits, joint or single annuities for his life, or selling his personal estate, reversion, or the chance he had from his grandmother: and this would have been, probably, the opinion of the best and wisest friend he had. None would advise the selling his personal estate—family pictures &c. which would be declaring himself bankrupt. The annual profits would not do it: nor would his creditors wait without impatience for it. As to annuities (the way taken by a tenant for life who wants money for particular purposes), it certainly is not a beneficial way of contracting. * * * Then his only chance to raise money was this: and it was the most reasonable way, if fairly done and on reasonable terms; and otherwise his goods might be taken in execution and sold for little value as **generally happens.**

Next, for the circumstances of the defendant, who is not charged in respect of his character, behaviour, or manner of dealing. * * * The defendant is not a person looking out for young men to prey upon; he did not think it a beneficial contract, and absolutely refused it: but afterwards accepted it, on particular application and pressing. Mr. Spencer himself, in private, fixed on what he thought the fair price, and does personally, and by agents, propose these terms to any who would buy; which were refused by several, only because not **advantageous.**

As to the manner, it is proposed, in the first moment, as a conditional bargain. If it turned out against the defendant, there was certainty of a loss: if for him, they might live so long as that there would be a very improbable chance of gain. No undue advantage is taken, for what is proposed is simply accepted.

As to the equality of it as a bargain of chance, whoever deals in or buys lives must have regard particularly to the constitution of the person, manner of life, and age. If the life is bad, the company will not insure at all: all circumstances must be considered, and it is enough to go on probable opinion. The bargain supposes an inequality in their lives, that the grandmother was most likely to die first: she was of good health and took care of it; Mr. Spencer the contrary, from his course of life. * * * The defendant has proved, that none would give that, or so much as he did: the plaintiff's have proved nothing of that, which would have been

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material to show the value of the contract. The disproportion, then, of the risk will not make it a bad contract: nor does this Court consider bargains in the nice scale of exact equality; nor adopt the rule of the Roman law, by which if a bargain was one-half under value, it was set aside.

Lastly his subsequent acts—as paying part, writing the letter himself to confess judgment, and taking every step after her death to carry it into execution—would not, perhaps, be of much weight if they were not consistent with his private opinion: his declarations in private being that he was honourably and fairly dealt by. The judgment was freely given, and not complained of afterwards, so that if it could have been set aside originally, it cannot now; and, being in his senses he might have released any demand. A release in terms of all his right to set it aside would have operated in point of law. Then is it not so in equity? A release, indeed, may, like any other contract, be set aside in this Court, but that must be on new imposition in obtaining the judgment. Things did not remain in the same situation, for now the money became absolutely due; nor was he under the same necessity; and might have disputed it then. In *Cole v. Gibbons* (a) the contract had not a possibility of being fair, yet there was no relief because it was confirmed with open eyes. In *Standard v. Metcalf* (b) the plaintiff lived with the defendant, her uncle, and soon after coming of age was prevailed on by him to settle her estate upon herself for life, remainder to her issue in tail remainder to her uncle and his heirs: she afterwards became a lunatic. The transaction was thought on the face of it to be hard, and an imposition by the uncle, acting as guardian, there being no consideration, nor any occasion for it, not being for marriage. On a bill to set it aside, the defendant insisted it was fair, and that after the settlement, she by will, to which he was not privy, had given the estate in the same way. Lord Talbot thought it an extraordinary contract, and unfair, though no proof of fraud, and said, if it depended on the settlement only, he should have relieved; but the will had confirmed it, which took off that ground to set it aside: on appeal it was affirmed, with this variation only, that as the bill was by the committee it ought not to bind the lunatic, but should be without prejudice to her, if she should become sane, and seek to set

(a) 3 P. W. 290.

(b) November, 1734.

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it aside. The will did not operate there, but only showed a confirmation. So, but in a stronger degree, does the subsequent act here. * * *

To consider *next* the question of law (a).

Next, whether this Court can set aside this legal contract upon arguments of conscience arising out of the case, and that in the utmost latitude. The proper jurisdiction of equity is, indeed, to take every one's act according to conscience, and not suffer undue advantage to be taken of the strict forms of positive rules. As this is only a ground of equity, it may indeed be made out by any sort of evidence upon all the circumstances; and on all together the Court cannot say the defendant is guilty of misbehaviour (which is not charged or suggested), or say this ought not to stand. Here is no fraud or over-reaching—no evidence from whence imposition is to be presumed; and the amount of the cases cited for the plaintiffs is, that the Court will relieve against fraud in this as in other cases.

But supposing these points against the plaintiffs, another and a very general question has been made of the first impression—viz., supposing the transaction good in law and conscience, yet this Court should, for the sake of making a rule, set it aside on principles of policy or political reasoning; for, on fraud, there can be no case in which this Court will not relieve. No political principle can be stated on which it should be set aside; therefore, such a ground of determination is impossible in this Court. There may be a difficulty to tell what sort of rule. It is admitted that no certain one can be drawn, because it would be dangerous when applied to particular cases; and it is, therefore, said, Acts of Parliament cannot be made to meet cases of this kind. This Court does not exercise or assume a legislative power, but disclaims it, and never will make a law to set aside contracts on public principles out of that cause, if good in law and conscience, let the convenience or inconvenience be what it will. The contracts in Exchange-alley were all contingencies; yet it was necessary to have an Act (b) to set them aside, although easily proved inconvenient to the public. So, of fair and equal wagers, an Act of Parliament, 7 Anne, c. 16 (c), was forced to interpose. So of gaming

(a) See note, *supra*, p. 292.

(c) Repealed Stat. Law Rev. Act,

(b) 7 Geo. 2, c. 8, and 10 Geo. 2, 1867.

c. 8, repealed by 23 Vict. c. 28.

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—money won at a fair hazard, without cheating; this Court never set it aside before the Legislature interposed: so that political arguments are never taken into consideration. * * *

Lastly, as to the case of post obits, it is said, where sons, whether in remainder or otherwise or *filius familias*, not having a fortune or emancipation of their own, are encouraged in riot and expense, the Court relieves, without evidence, from the particular purpose, because no son, in the life of his father, shall make such a bargain: but that is not the ground of relief, for that may be denied, like all other presumptions; from the reason of the thing, it is the misbehaviour to persons under this description to share in riot and encourage disobedience: which appears from Domat, under the general title “Loan;” * * * and, in another place he says, that on a bargain with *filius familias*, under such circumstances there may be relief, under such not; not saying but that a son might, for a portion, even when *filius familias*, do it. As to which an observation arises in the case determined by Lord *Nottingham*, who relieved against many of these contracts on particular evidence. Lord *North* thought he went too far; Lord *Jeffries*, that he did not go far enough, which is not to be wondered at; for judging upon circumstantial evidence, they might draw different conclusions. Lord *Nottingham*’s reasons, in manuscript, shew he did not think he was going on the general rule, that a son could not sell a contingency. The case is entitled *Berny v. Pitt (a)*. Berny was drawn into several securities for money, to be paid after his father’s death, who then was infirm, and kept alive by art; by some he was to pay five for one, and thus was involved in debts to 50,000*l.* or 60,000*l.*, in all which he appeared to be circumvented and beset; most of the money pretended to be borrowed, being raised by delivery of wares, at an excessive price, as wine, hemp, &c., which could not be sold for a quarter of the price; but the plaintiff, from his necessity (his creditors being underhand procured to fall upon him), was willing to get money on terms against which he sought relief. Lord *Nottingham* first made him pay the principal borrowed, before he would give an injunction, but relieved him as to the rest at the hearing, because, he said, this infamous dealing ought to be suppressed. That the Star Chamber used to punish, and this Court ought to do it; and that no family

(a) 2 Ch. R. 396.

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could be safe if this was suffered. But Pitt prevailed and the bill against him was dismissed, though he gained about three for one, for it was in the time of his father's health, three years before his death, without any circumvention or practice, upon an express agreement to lose the principal if the son died in his father's life; which shews the ground of the determination—relieving against those defendants guilty of misbehaviour, yet thinking that a proper bargain might be made by the heir. Lord *Jepheries*, on the evidence of that case, when before him, laid a different stress, and relieved against Pitt also. From that time there is no case, until *Taristleton v. Griffith* (a), which turned on the particular fraud and circumvention. They cited further *Curry v. Milner* (b), *Loxley v. Hooper* (c), *Batty v. Lloyd* (d). * * * Contracts for contingencies have been admitted; *Breckley v. Newland* (e), *Hobson v. Trevor* (f), *Whitfield v. Fausset* (g). * * * But what is this public good which is not to be defined? Is the end proposed by this, that none shall spend above his annual income? That is not to be secured in human nature, or prevented. Though the Romans had that law, they were allowed to spend their estates. Is property to be locked up to another generation?—for that effect it will have, which is contrary to the principles of the constitution of the legal part of the government, the later books, perhaps for 200 years, giving a reason why the statute *De Donis* (h) is not to be kept and preserved, that mankind may apply their property to pay their debts; and judges have said, there is great inconvenience in people not being able to sell their own estates. Is the end proposed, that a man may raise money on easier terms if this is set aside? The consequence would be directly contrary. If one wants money, and a difficulty is laid upon contracting with fair, honest men, he will go into the hands of knaves, who will make him pay for running the risk of the law, and insist on more, when it is understood that he could not make a contingent bargain. This was not lent to feed riot, but to get rid of a pressure, which is a reasonable cause, and, therefore, no ground to

(a) 1 P. W. 310.

(b) 3 P. W. 293, n.

(c) 3 Atk. 278.

(d) 1 Vern. 141.

(e) 2 P. W. 182.

(f) 2 P. W. 191.

(g) 1 V. 387, 1750.

(h) 13 Edw. 1.

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set it aside on political motives. As the law cannot find out a general rule to proceed on much less will this Court; and in every case where equity cannot relieve, it is not fit to be relieved.

February 4, 1750-1.

The Court (*Barnett, J., Stratton, M.R., Lee, C.J. (Willes, C.J., absent); Hardwicke, C.*) delivered their opinion. [The judgments, other than that of *Hardwicke, C.*, are omitted. They agreed with that of the Lord Chancellor.]

LORD CHANCELLOR HARDWICKE.—Before I proceed to give my own opinion in this case, I must take notice that Lord Chief Justice *Willes* has signified to me his entire concurrence on these three points.

Next, that the great and able assistance I have had in this case has made my task extremely easy; and, as I concur in the decree I am advised to make, the great pains taken in clearing up and considering the points might have excused me from taking up any time. One thing I ought to say in the outset—that if I could have foreseen upon what particular point the judgment in this case would fundamentally turn, I should have spared the Judges the trouble of this attendance. As three points have been properly made at the Bar, it is necessary to say something to each.

The *first* is a mere question of law upon the Statutes of Usury (*a*). * * * The *second* question is, supposing the first contract to be valid in law, whether it is contrary to conscience, and to be relieved against in this Court upon any head or principle of equity. I will follow the prudent example of not giving any direct and conclusive opinion. As it would be unnecessary, it is the safest not to do it; yet it has been made necessary to say something on it. It cannot be said that such contracts deserve to be encouraged, for they generally proceed from excessive prodigality on one hand, and extortion on the other, which are *vitia temporis*, and pernicious in their consequences; and then it is the duty of a Court, if it can, to restrain them.

This Court has an undoubted jurisdiction to relieve against every species of fraud.

(*a*) See note (*a*), *supra*, p. 292.

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(1) [†] *First*, then, fraud which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case.

(2) *Secondly*, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other, which are inequitable and unconscientious bargains; and of such even the common law has taken notice; for which, if it would not look a little ludicrous, might be cited *James v. Morgan* (a).

(3) A third kind of fraud (b) is, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed; but it is wisely established in this Court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other.

(4) A fourth kind of fraud may be collected or inferred, in the consideration of this Court, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement. It may sound odd, that an agreement may be infected by being a deceit on others not parties; but such there are, and against such there has been relief. Of this kind have been marriage-brochage contracts, neither of the parties herein being deceived; but they tend necessarily to the deceit on one party to the marriage, or of the parent, or of the friend. So, in a clandestine private agreement to return part of the portion of the wife, or provision stipulated for the husband, to the parent or guardian. In most of these cases it is done with their eyes open, and knowing

† *Note*.—The numbers have been added for the sake of reference.

(a) 1 Lev. 111. This case is thus quaintly reported by Levinge. "Assumpsit de payer pur un chival, un Barly-corn a nail, et double every nail; et avcrre que la feurent 32 nails en lese soliers del chival, que dublant chescun nail, veignant al 500 quarters de Barly. Et sur non assumpsit, le cause esteant

try devant Hilde al Herford, il direct le jury pur donner le value del chival en damages osteant £8. Et issint ils fesoient et fut apres move en arrest de judgment pur un petit fault en le declaration, que fut over-ruled: et judgment done pur le plaintiff."

(b) Fraud presumed from the circumstances and condition of the parties.

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what they do, but, if there is fraud therein, the Court holds it infected thereby, and relieves. So where a debtor enters into a deed of composition with his creditors for 10s. in the pound, or any other rate, attended with a proviso that all creditors executed this within a certain period, if the debtor privately agrees with one creditor, to induce him to sign this deed that he will pay, or secure a greater sum in respect of his particular debt—in this there can be no particular deceit on the debtor who is party thereto, but it tends to deceit of the other creditors, who relied on an equal composition, and did it out of compassion to the debtor (a). This Court, therefore, relieves against all such *underhand bargains*. So, of premiums, contracted to be given for preferring or recommending to a public office or employment: none of the parties are defrauded; but the persons having the legal appointment of these offices are or may be deceived thereby; or if any person, agreeing to take the premium, has authority to appoint the officer, it tends to public mischief, by introducing an unworthy object for an unworthy consideration. These cases show what Courts of equity mean when they profess to go on reasons drawn from public utility. To weaken the force of such reasons, they have been called political arguments, and introducing politics into the decision of Courts of justice. This was showing the thing in the light which best served the argument for the defendant, but far from the true one, if the word “politics” is taken in the common acceptation, but if in its true original meaning, it comprehends everything that concerns the government of the country, of which the administration of justice makes a considerable part; and in this sense it is admitted always. To apply this: thus far, and in this sense, is relief in a Court of equity founded on public utility. Particular persons, in contracts, shall not only transact *bonâ fide* between themselves, but shall not transact *malâ fide* in respect of other persons who stand in such a relation to either as to be affected by the contract, or the consequences of it; and as the rest of mankind, besides the parties contracting, are concerned, it is properly said to be governed on public utility.

(5) The last head of fraud on which there has been relief is that

(a) *Mare v. Sandford*, 1 Gif. 288; 20 Eq. 63; *In re Lenzberg's Policy*, 7 M'Kewan v. Sanderson, 15 Eq. 229, C. D. 650.

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which infects catching bargains with heirs-reversioners, or expectants, in the life of the fathers, &c., against which relief always extended. These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain; which was the particular ground on which there was relief against Pitt, there being no declaration there of any circumvention, as appears from the book, but merely from the intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate has been kept in the dark; the heir, or expectant, has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation: this misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand.

Consider which of these species is in the present case. There is no colour of evidence of actual fraud in the defendant, who did not think he was doing anything immoral or unjust; although, if the declarations of Mr. Spencer can be believed, the defendant had a misgiving how far it could be held good in this Court. But though this case is clearer of actual fraud than almost any that has come, yet several things are insisted on for the plaintiffs—as necessity on one side, and advantage taken of it on the other; unconscionableness in its nature, from the terms of paying two for one, in case of the death of an old woman, the next week or day; that there was deceit upon her, who was *in loco parentis*, from whom were his great expectations. This was, however, the thing intended. I admit, also, there are more circumstances alleged on the side of the defendant, to weaken and take off, than have concurred in most cases of this kind. Mr. Spencer was of the age of *thirty*; possessed of a great estate of his own; not weak in mind, but of good sense and parts—though in that the witnesses differ. If it was necessary to give an opinion upon this point, I should consider the weight of these

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objections, and the answers to them; but as it is not, I will only consider the contingency inserted, which was to cure the whole.

I would not have thought that the insertion of such a contingency would in every case sanctify such a bargain. Suppose such a bargain made by a son in the life of his father or grandfather, on whom was his whole dependency; I appeal to everyone, what the consequence of it would be. Whether such a contingency is inserted or not, it will come to the same thing, the creditor knowing the fund for payment must depend on the debtor surviving the father or grandfather, whether it is said so or not; and therefore I have always thought there was great sense in what Vernon reports to be said by the Court in *Berney v. Pitt*, "that the expressing the death of the son in the life of the father makes the case worse."

I have not mentioned the reasons drawn from the discouragement of prodigality, and preventing the ruin of families—considerations of weight, and ingredients which the Court has often very wisely taken along with them. It is said, for the defendant, to be vain and wild for the Court to proceed on such principles. If it had been said it was ineffectual in many instances, I should have agreed thereto; but I cannot hold that to be vain and wild which the law of all countries, and all wise legislatures, have endeavoured at as far as possible. The senate and lawmakers in Rome were not so weak as not to know that a law to restrain prodigality, to prevent a son running in debt in the life of his father, would be vain in many cases; yet they made laws to this purpose, viz., the Macedonian decree (*De Senatu Consulto Macedoniano*, Dig. lib. xiv. tit. vi.), already mentioned; happy if they could in some degree prevent it; *est aliquod prodire tenus*.

It is said for the defendant, that this would be to assume a legislative authority, and that several Acts of Parliament have been thought necessary to restrain and make void contracts of a pernicious tendency to the public. What can be properly called such an assuming in this Court I utterly disclaim; but, notwithstanding, I shall not be afraid to exercise a jurisdiction I find established, and shall adhere to precedents. As far, therefore, as the Court went in *Berney v. Pitt* (a), in *Twistleton v. Griffith* (b), in *Curcyn v. Milner* (c), and the opinion of Lord Talbot on the original trans-

(a) 2 Vern. 14.

(b) 1 P. W. 310.

(c) 3 P. W. 293, n.

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action in *Cole v. Gibbons* (a), so far, and as far as these principles do naturally and justly lead, I shall not scruple to follow. The Acts of Parliament (b) instanced will be found to be made (many of them), not for want of power in this Court to give relief in many of these contracts, *but to make them void in law, to give the party a short remedy against them.*

The judgment I am going to give will not be founded upon this, but I have done it that the work of this day may not be misunderstood, or precedents thought to be shaken: not that this establishes such a contract as is called fair, like killing fairly in a duel which **the law does not allow as an excuse for murder.** **Junct annuities** and post obits are grown into trade, which ought to abate of its fairness.

As to the *last* question, of the subsequent acts of Mr. Spencer: this is the point on which the determination of this case will depend, and I entirely agree with the opinion delivered already. Had the first bond been void by the Statutes of Usury, no new engagement would have made it better; the original would have infected it. But if a man is fully informed, and with his eyes open, he may fairly release and come to a new agreement, and bar himself of relief, which might be had in this Court. The material inquiry is, whether this was done, after full information, freely, without compulsion, &c.; and upon the best consideration of the evidence, it appears to be so done, and with fairness.

First, the condition of the necessity of Mr. Spencer was over: for though he had no power over the capital of this accession of estate, yet it was so great a one, that little more than one-third of a year's income would have paid off the whole. If that, then, be a **state of necessity, how far shall it be carried?**

Then the state of expectancy was over by the death of the duchess, and also the danger of her coming to the knowledge of his conduct and circumstances, and his fear of offending her, which was the principal restraint upon him; so that there was no ancestor or relation left upon whom any deceit could be committed in consequence of any new agreement; and it appears, that, before this new bond he had sufficient notice that he had a chance, at least, that he

(a) 3 P. W. 290.

(b) I.e., the Acts against usury.

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might have relief in equity, from the defendant's own declaration to him of his doubt whether it would be good.

Lastly, there was no impediment against his seeking relief by disclosing the whole case at that time in a court of justice.

Under these circumstances was the new engagement, without any fraud, contrivance, or surprise to draw him in, which operates more strongly than the deed of confirmation in *Cole v. Gibbons*, that it is too much to set it aside. The only difference to distinguish that from this case was, that there the releasor was not in the power of the releasee; here Mr. Spencer was debtor (*a*), and his creditor might immediately have distressed him by an action: but the answer is, there was neither an attempt nor threat to bring an action. It is objected further for the plaintiffs, that *Cole v. Gibbons* was a single case; and there are several precedents in which such new security and subsequent transaction were not sufficient to give a sanction to a demand of this kind, as in *Lord Ardglass v. Muschatup*; but the circumstances there show it not to be at all applicable. Then the confirmation in *Wiseman v. Beake* was still more extraordinary; and that was a very extraordinary invention of Serjeant *Philips*, of a bill to be foreclosed against a relief in equity. In both those cases the original transaction was grossly fraudulent; but I have only shown it here to be a doubtful object of relief in this Court, which surely is the most proper case of all others to put an end to by a new engagement.

On the whole, therefore, the only relief is that which I am advised to give against the penalty of the last bond.

The only doubt which could arise on this is as to costs, to which the defendant is not entitled. The plaintiffs are only executors; they had a probable cause of litigating this contract, which is far from deserving favour, and were in the right to submit it to the judgment of the Court; and it is observable, that in *Cole v. Gibbons*, which was on this point, the bill was dismissed without costs, and no costs given on the bill, but, on the contrary, deducted. There was indeed, in that case, no penalty, as there is here; but still that does not take away the discretion of this Court in respect of costs, according to the circumstances of the case; and there are several cases of a bond with a penalty disputed, where, though the costs at law will

(a) See *Fox v. Mackreth*, *post*.

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undoubtedly follow the demand, yet on the circumstances, costs in this Court are refused.

Therefore, let it be referred to the Master to take an account of the principal and interest due on the bonds of 1744, and the judgment thereon, and to tax the defendant his costs at law, and an account of the money paid by Mr. Spencer to the defendant, and let that first be applied to discharge the interest, and then to sink the principal, and all just allowances be made, and, on payment by the plaintiffs to the defendant of what is found due, let the defendant deliver up the bond to be cancelled, and acknowledge satisfaction on the judgment: but that must be at the expense of the plaintiffs. And, if the plaintiffs pay what is so found due, let there be no costs in this Court on either side; but, otherwise, let the bill be dismissed with costs.

NOTES.

1. Generally.
2. What dealings with reversionary interests are unimpeachable, p. 314.
3. What constitutes inadequacy of price, p. 317.
4. Sales of Reversions Act (1867), p. 318.
5. As to terms upon which an unconscionable bargain will be set aside, p. 323.
6. Confirmation and acquiescence, p. 324.

1. Generally.

Chesterfield v. Janssen is a case of very frequent reference celebrated alike for the able arguments of the counsel on both sides and for the opinions of the learned judges who assisted Lord *Hardwicke*, but especially for the elaborate and learned judgment of Lord *Hardwicke*, in which he has classified the different species of frauds against which equity will give relief.

Having regard to modern authorities, it is convenient that the word "Fraud" should be restricted to the first head of fraud dealt with by Lord *Hardwicke*, that is, to cases in which there is some moral delinquency, some actual meditated and intentional fraud, and that the remaining divisions should be classified under the head of "Constructive Fraud" (*a*), which includes those numerous cases in which equity gives relief against acts and contracts, although

(*a*) Cf. Story, Eq. Jur. (1892), p. 164.

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untainted by any actual evil design, on the ground of general public policy or on some fixed artificial policy of the law.

It is proposed in this note to notice only that species of constructive fraud in which equity gives relief on account of the hardness or unfairness of the bargain (*a*). Speaking of catching bargains with heirs, &c., which is only a branch of this subject, Lord *Hardwicke* says: "These have been generally mixed cases, compounded of all or several species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud *presumed or inferred* from the circumstances or conditions of the parties contracting—weakness on the one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain. * * *

But "fraud does not here mean deceit or circumvention: it means an unconscientious use of the power arising out of these circumstances and conditions: and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable" (*b*). The point to be considered is, Is the bargain a hard one? (*c*); Has an unfair advantage been taken? (*d*); Were the parties on equal terms? (*e*). The doctrine has nothing to do with fraud, but only with such unfair dealing as amounts to a moral delinquency (*f*).

Inadequacy of Price.—Mere inadequacy of price, unless it were the result of fraud, surprise, or misrepresentation (*g*), has never been a sufficient ground to set aside a purchase of *interests in possession*, unless the inadequacy were so gross as to be of itself clear evidence

(*a*) See the judgment, *supra*, p. 301, Classes 2, 3, 5.

(*b*) Per *Selborne*, C., in *Aylesford v. Morris*, 8 Ch. 491, and see *Ib.*, p. 492. See also *Miller v. Cook*, 10 Eq. 641; *Tyler v. Yates*, 6 Ch. 665; *Beynon v. Cook*, 10 Ch. 391, 392, n.; *Ib.* 389; *O'Rourke v. Bolingbroke*, 2 Ch., p. 833.

(*c*) *Beynon v. Cook*, *infra*.

(*d*) *Middleton v. Brown*, 47 L. J. Ch. 411.

(*e*) *Wood v. Abrey*, 3 Madd. 417.

(*f*) See judgment of *Jessell*, M.R., in *Beynon v. Cook*, 10 Ch. 391, and of *Kay*, J., in *Fry v. Lane*, 40 C. D., p. 234; and *James v. Kerr*, 40 C. D., p. 460; *Rees v. De Bernardy*, 12 Times L. R. 412.

(*g*) *Evans v. Llewellyn*, 2 Bro. Ch. 150; *Pickett v. Loggon*, 14 V. 215; *Reynell v. Sprye*, 8 Ha. 222; 1 De G. M. & G. 660; *Summers v. Griffiths*, 35 B. 27.

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of fraud. "To set aside a conveyance," says Lord *Thurlow*, "there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it" (a).

But, with regard to expectants (b), and reversioners (c), the authorities clearly show, even in the absence of the different species of frauds which are frequently ingredients in such transactions, that *mere inadequacy of price* was a sufficient ground for rescinding contracts or dealings with them for their expectancies or reversionary interests. In such cases the onus was on the purchaser to show that he had given the "fair" value (d), or the "market value" (e). Since the Act as to Sales of Reversions (f), undervalue is still a material element in cases in which it is not the sole equitable ground of relief, and the burden of proof is still on the other contracting party to prove that the transaction has been fair, just, and reasonable (g).

"*Expectants*"; "*Expectant Heirs*,"—"The phrase is used, not in its literal meaning, but as including everyone who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and everyone who has the hope of succession to the property of an ancestor, either by reason of his being the heir-apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relation. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen, as appears from *Tottenham v. Emmet* (h), and *Earl of Aylesford v. Morris* (i). So

(a) *Gwynne v. Heaton*, 1 Bro. Ch. 8; and see *James v. Morgan*, 1 Lev. 111; *Stilwell v. Wilkins*, Jac. 280; *Rice v. Gordon*, 11 B. 265; *Longmate v. Ledger*, 6 Jur. N. S. 481; *Haygarth v. Wearing*, 12 Eq. 320; *Tennent v. T.*, L. R. 2 H. L. Sc. & D. 6; *Butler v. Miller*, 1 Ir. R. Eq. 195.

(b) *Wiseman v. Beake*, 2 Vern. 121; *Cole v. Gibbons*, 3 P. W. 290; *King v. Savery*, 1 Sm. & G. 271.

(c) *Kendall v. Beckett*, 2 Russ. & M. 88; *Bawtree v. Watson*, 3 My. & K. 330; *Davies v. Cooper*, 5 My. & C. 270; *Edwards v. Browne*, 2 Coll. Ch.

R. 100.

(d) *Aldborough v. Trye*, 7 Cl. & Fin. 436, 456.

(e) *Talbot v. Stainforth*, 1 John. & H. 484, 503.

(f) See 31 Vict. c. 4, an Act to amend the law relating to Sales of Reversions, 7 Dec., 1867, *infra*, p. 318.

(g) See judgment of *Silborne, C.*, *Aylesford v. Morris*, 8 Ch., pp. 490-491; and see *O'Rourke v. Bolingbroke*, 2 Ch., p. 835, where this burden of proof was held to be satisfied.

(h) 14 W. R. 3.

(i) 8 Ch. 484.

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that the doctrine not only includes the class I have mentioned, who in some popular sense might be called expectant heirs, but also all remaindermen and reversioners" (a). In *Nevill v. Snelling* (b) the principle was extended to the case in which the plaintiff was a minor, without any property or any expectation of any, except such as was founded on his father's position in life. The money was borrowed from a money-lender simply on the credit of such expectations, and was advanced in the hope of extorting money from the father by threatening his son with bankruptcy. *Deane*, J., after reviewing the authorities, held that the securities should stand for the sums actually advanced, with five per cent. interest. "I can find no case," he said, "which decides that the interference of the Court is limited to cases in which the dealings have been with expectant heirs or reversioners, or to cases in which the dealing has been one in relation to the expectancy. * * * The real question in every case seems to me to be whether the dealings have been * * * fair, and whether undue advantage has been taken by the money lender of the weakness or necessities of the person raising the money" (c). In *James v. Kerr* (d) a person who merely claimed a share of real estate but who entered into a hard bargain, was treated as being in a position analogous to an expectant heir. These cases, with the exception of *Tottenham v. Emmet*, were subsequent to the Sales or Reversions Act, 1867 (*infra*, p. 318).

Application of the Rule.—These transactions most frequently come before the Courts in the shape of loans, sales, and mortgages, contracted or effected by expectants (e).

Where a reversioner has *mortgaged* his estate, or has granted an *annuity* or has given a *bond* or *other security* for the payment of a sum of money or an annuity at the death of his father, the transaction, unless it appeared to be reasonable or the price adequate, would be set aside upon proper terms (f). But in *Benyon v.*

(a) Per *Jessel*, M. R., in *Beynon v. Cook*, 10 Ch. 391. See also *Fry v. Lane*, 40 C. D. 312.

(b) 15 C. D. 679.

(c) *Ib.*, pp. 702, 703. And see judgment of *Hatherley*, C., in *O'Rourke v. Bolingbroke*, cited *infra*, p. 322; *Croft v. Graham*, 2 De G. J. & S. 135; *Bromley v. Smith*, 26 B. 644; *Tyler v. Yates*, 6 Ch. 665; *Earl of Ayles-*

ford v. Morris, 8 Ch. 484; *Rao v. Joyce*, 29 L. R. Ir. 500.

(d) 40 C. D. 449. And see *Rees v. De Bernardy*, 12 Times L. R. 412.

(e) *Curwyn v. Milner*, 3 P. W. 293, n.; *Peacock v. Evans*, 16 V. 512; and see *Freme v. Brade*, 2 De G. & J. 582; *Rees v. De Bernardy*, *supra*.

(f) *Barney v. Beak*, 2 Ch. Ca. 136; *Wiseman v. Beake*, 2 Vern. 121; *Borny*

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Fitch (a), the Court, under the circumstances, held the mortgagee entitled to the amount for which the mortgagor had given bills, and not simply to the money actually advanced upon them.

In *Re Maskell, &c., Contract (b)* it appeared on the face of the title that the purchase money paid by the vendor to certain infants was not of the full value of their shares, and that they were still under twenty-one. The Court held that the title could not be forced on the purchaser.

The application of the rule is not prevented by the fact, that the expectant heir was a person of mature age (*c*), nor that he perfectly understood the nature and extent of the transaction; nor is it necessary for the heir to show that he was in pecuniary distress at the time (*d*).

The onus, in cases not coming within the Sales of Reversionary Act (*e*), lies upon the person dealing with a reversioner or expectant, even although he does not combine the character of heir, to show that the transaction is reasonable, or the price given adequate (*f*).

If the bulk of the property sold is reversionary, the mere fact of a part of it being in possession (especially if colourably thrown into the contract, and bearing but a small proportion to the whole), does

v. Pitt, 2 Vern. 14; *Gwynne v. Heaton*, 1 Bro. Ch. 1; *Gowland v. De Faria*, 17 V. 20; *Evans v. Cheshire*, Belt's Supp. to V. 300; *Smith v. Kay*, 7 H. L. Cas. 750; *Bromley v. Smith*, 26 B. 644; *Pennell v. Millar*, 23 B. 172; *Emmet v. Tottenham*, 14 W. R. 3; *Re Unsworth*, 13 W. R. 488; *Tottenham v. Green*, 32 L. J. Ch. 201.

(*a*) 35 B. 570.

(*b*) (1895) 2 Ch. 525.

(*c*) *Earl of Portmore v. Taylor*, 4 Si. 182; *Davis v. Marlborough*, 2 Swans. 143, and see the principal case, p. 290, *supra*; *Clark v. Malpas*, 4 De G. F. & J. 401; *Tynte v. Hodge*, 1 Hem. & M. 287, 296; *Beynon v. Cook*, 10 Ch. 389; *Helsham v. Barnett*, 21 W. R. 309; *Howley v. Cook*, 8 Ir. R. Eq. 570; *Wiseman v. Beake*, 2 Vern. 121, where the plaintiff was nearly 40, and was a proctor.

(*d*) *Bromley v. Smith*, 26 B. 644;

Salter v. Bradshaw, 26 B. 161; *St. Albyn v. Harding*, 27 B. 11; *Foster v. Roberts*, 29 B. 467; *Emmet v. Tottenham*, 10 Jur. (N. S.) 1090.

(*e*) *Infra*, p. 318.

(*f*) *Gowland v. De Faria*, 17 V. 70; *Woodroffe v. Allen*, 1 Hayes & J. 73; *Bawtree v. Watson*, 3 My. & K. 339; *Edwards v. Browne*, 2 Coll. Ch. R. 100; *Sewell v. Walker*, 12 Jur. 1041; *Davies v. Cooper*, and *Cooper v. Jackson*, 5 My. & C. 270; *Addis v. Campbell*, 1 B. 258; *King v. Savery*, 5 H. L. Cas. 627; *Edwards v. Burt*, 2 De G. M. & G. 55; *Bromley v. Smith*, 26 B. 644; *Salter v. Bradshaw*, 26 B. 161; *St. Albyn v. Harding*, 27 B. 11; *Foster v. Roberts*, 29 B. 467; *Jones v. Ricketts*, 31 B. 130; *Sharp v. Leach*, 31 B. 491; *Talbot v. Staniforth*, 10 W. R. 829; *Dally v. Wouham*, 33 B. 154; *Beynon v. Fitch*, 35 B. 570.

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not prevent the application of the rule of equity with respect to sales of interests in reversion (*a*).

The fact that the reversion depended upon contingencies that were supposed to be incapable of being valued by actuaries (*b*), did not relieve the purchaser from the burden of showing that the full value was given (*c*).

Relief might be had against a sub-purchaser with full notice of the original fraud in the purchase from a reversioner (*d*).

Equity will also give relief, especially in the case of an expectant heir, against usurious loans, effected under the mask of trading, where, instead of money being actually advanced, goods are supplied by a tradesman merely for the purpose of being at once sold, and will in general set aside such transactions upon payment of what the goods produced upon a re-sale, and interest (*e*). In *Barker v. Wanssumer* (*f*) a young man, immediately upon coming of age, and wanting to raise money, gave a bond for the price of some silks to be resold by him. "I take it," said Lord *Thurlow*, on setting aside the transaction "as an advancement of goods, instead of money to supply his necessities." But the decision turned on the transaction being a loan at usurious interest (*g*). In *King v. Hamlet* (*h*), *Brougham*, C. refused to relieve against a mortgage of a reversionary interest given by an heir in necessitous circumstances, for the price of goods reasonably and fairly charged, which were immediately sold to raise money, at a loss on the whole transaction of 60*l.* per cent. The decision in this case was founded principally upon two propositions, to the effect, that where the heir deals, not behind the back of his father, but with his sanction and assistance, and has all the protection his father can give him, he is not entitled to relief. But these propositions have been questioned (*i*), and it may now be considered as

(*a*) *Davis v. Marlborough*, 2 Swans. 154; *Earl of Portmore v. Taylor*, 4 Si. 182; and see and consider *Nesbitt v. Berridge*, 4 De G. J. & S. 54; *Webster v. Cook*, 2 Ch. 542; *Tyler v. Yates*, 11 Eq. 276.

(*b*) See *Baker v. Bent*, 1 Russ. & M. 224; *Davies v. Cooper*, 5 My. & C. 270; *Boothby v. B.*, 1 Mac. & G. 604.

(*c*) *Talbot v. Staniforth*, 1 John. & H. 484; *Woodroffe v. Allen*, 1 H. & Tw. 73.

(*d*) *Addis v. Campbell*, 4 B. 401; *King v. Savery*, 5 H. L. Cas. 627; *Wright v. Vanderplank*, 2 Jur. (N. S.)

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(*e*) *Waller v. Dalt*, 1 Dick. 8; *Barney v. Beak*, 2 Ch. Ca. 136.

(*f*) 1 Bro. Ch. 149.

(*g*) See *King v. Hamlet*, 2 My. & K. 485.

(*h*) 2 My. & K. 456, affirmed 3 Cl. & Fin. 215, but without reasons.

(*i*) See *Talbot v. Staniforth*, 1 John. & H. 484, 502; *Sugden, V. & P.* 11th ed., pp. 316, 1084; *Dart* (1858), vol. ii., p. 847; *King v. Savery*, 5 H. L. Cas. 267; *Aylesford v. Morris*, 8 Ch., p. 491; *O'Rourke v. Bolingbroke* 2 App. Cas., p. 828.

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established, notwithstanding the law as laid down by Lord *Broughton* that the mere fact that the dealings with regard to an expectancy are known to his father's family or friends, or even that he had professional advice, though material as evidence in rebutting the presumption of oppression and extortion (*a*), is not sufficient of itself to prevent relief in a proper case from being given (*b*).

Extension of the Principle.—*Deaman, J.*, commenting upon the distinction drawn by Courts of equity between the cases of expectant heirs and other persons, points out that even in the case of the former, stress is often laid upon other circumstances rather than upon their position as expectant heirs, and concludes that it is impossible to say, as a whole, that the Court will not interfere in any given case, though it may be a case in which that particular ground of interference does not exist, and he concludes that if the facts are such that the Court would have interfered before the repeal of the usury laws, it will still interfere except so far as the objections are founded upon the usury laws alone (*c*). The principle on which equity originally proceeded in setting aside transactions of this kind was the protection of family property, but it has been extended to all cases in which the parties to a contract have not met upon equal terms. In the case, therefore, of expectant heirs, or of persons under pressure without adequate protection, and in the case of dealings with uneducated ignorant persons, the burthen of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract (*d*). And relief has been given in the following cases:—In *Wood v. Abrey* (*e*), where the only professional person employed was the purchaser's solicitor, and the price was one-fourth of the value, and the vendor was in distressed circumstances; in *Longmate v. Ledger* (*f*), where property in possession was sold at an undervalue, and one solicitor acted for both parties,

(*a*) *O'Rorke v. Bolingbroke*, 2 App. Cas. 814.

(*b*) *Talbot v. Staniforth*, 1 John. & H. 484, 502; *King v. Savery*, 5 H. L. Cas. 627; *Earl of Aylesford v. Morris*, 8 Ch. 492; *Miller v. Cook*, 10 Eq. 641, 647; *Edwards v. Browne*, 2 Coll. Ch. R. 100; *Playford v. P.*, 4 Ha. 546.

(*c*) *Nevill v. Snelling*, 15 C. D., pp. 696, 702; and as to the objection of usurious interest alone, see *Webster v. Cook*, 2 Ch. 542; *Parker v. Butcher*, 3 Eq., p. 767; *Rees v. De Bernardy*, 12

Times L. R. 412.

(*d*) See judgment of *Hatherley, C.*, in *O'Rorke v. Bolingbroke*, 2 L. R. H. L., p. 823; *Nevill v. Snelling*, *supra*, p. 310; *Pross v. Coke*, 6 Ch. 645; *Evans v. Llewellyn*, 1 Cox, 333; *Haygarth v. Wearing*, 12 Eq. 320; *Clark v. Malpas*, 4 De G. F. & J. 401, in both of which cases the plaintiffs were in possession.

(*e*) 3 Madd. 417, 423.

(*f*) 4 De G. F. & J. 402.

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and the vendor was aged, infirm, and weak minded; in *Baker v. Monk* (a), where the vendor was an elderly woman in humble life, and the same solicitor acted for all parties. In *James v. Kerr* (b), K., a solicitor, advanced money to J., a man in poor circumstances to enable him to meet the costs of a suit in which he claimed real estate, and J. gave K. a mortgage to secure 225/., "by way of bonus" if he won, and further advances. J. was held to be in a position analogous to that of an "expectant heir," and was allowed to redeem on payment of sums actually advanced. In short, wherever a purchase is made at a considerable undervalue from a person who is poor, or ignorant or weak, and the vendor has no independent advice, the transaction may be set aside (c).

2. What Dealings with Reversionary Interests are Unimpeachable.

Family Arrangements.—In regarding claims to upset re-settlements of family estates, the Court gives weight to considerations which in other cases would not be allowed in the scale. For the validity of such an arrangement the son being tenant in tail in remainder, it is not essential that the son should have independent advice, and the Court will not inquire whether the influence of the father was exerted with more or less force (d). But if the father takes a direct benefit of considerable amount, although the amount will not be scrutinized severely (e), he must prove the transaction was fair and honest. And if unfair, such part of the settlement may be expunged (f).

But the transaction must be strictly a family arrangement; so where a tenant for life purchased from his nephew the reversion in the family estate without any provision for its resettlement, it was held that the case fell within the general rule as to dealings with reversionary interests (g). A settlement by an heir in favour of his

(a) 4 De G. J. & S. 388.

(b) 40 C. D. 449. And see *Rees v. De Bernardy*, 12 Times L. R. 412, a "next of kin" agent.

(c) *Fry v. Lane*, 40 C. D., p. 322; and see as to lunatics, *Manly v. Bewicke*, 3 Kay & J. 342; *Nelson v. Duncombe*, 9 B. 211; as to drunkards, *Corry v. C.*, 1 V. 19; *Cooke v. Clayworth*, 18 V. 12.

(d) See p. 242, supra (n.), "Family arrangements."

(e) *Williams v. W.*, 2 Ch. 294.

(f) *Ib.* And see *Tweddell v. T.*, T. & R. 13; *Heron v. H.*, 2 Atk. 160;

Wallace v. W., 2 D. & W. 452; *Greenwood v. G.*, 2 De G. J. & S. 28; *Brooke v. Lord Mostyn*, *Ib.*, 373; *Jenner v. J.*, 2 De G. F. & J. 359; *Hartopp v. H.*, 21 B. 259; *Wakefield v. Gibbon*, 1 Gif. 401; *Bellamy v. Sabine*, 1 Ph. 425; *Firmin v. Pulham*, 2 De G. & Sm. 99; *Willoughby v. Brideoke*, 13 W. R. 515; and see the notes to *Huguenin v. Baseley*, ante, p. 271; and *Stapilton v. S.*, ante, p. 242.

(g) *Talbot v. Staniforth*, 1 John. & H. 184.

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wife and children is not within the doctrine laid down in the principal case (*a*).

Sale by Auction.—The sale of a reversionary interest by auction, if fairly conducted (*b*), rendered it unnecessary for the purchaser to show that he had given an adequate price, unless the circumstances were such as to affect the purchaser with notice of any inadequacy in the transaction (*c*).

Other Cases.—The sale, however, of a reversionary interest might be presumed to be at an adequate value though it should not be by public auction. When the vendor and purchaser concur in a valuation thereof previously to the sale by persons of competent skill, adequate value may be presumed (*d*); and so where a fair test of the market value can be obtained by the knowledge of the highest bid for it upon a previous attempt to sell it by auction (*e*). And the fact that a reversionary interest had been offered to and declined by many persons for a certain sum may be a sufficient reason for the Court declining to set aside a subsequent sale for the same price (*f*).

But where, upon the sale by private contract of a reversionary interest in leaseholds, nothing was done except obtaining the opinion of an actuary unacquainted with the local circumstances likely to influence the value, and in a suit to impeach the sale, the purchaser was unable to show that he had given the full value, the sale was set aside (*g*).

A lot purchased by private contract at an inadequate price may be set aside, although assigned by the same deed with a lot purchased by public auction (*h*).

The rule as to the sale of reversionary interests was not applied to a sale of property by the reversioner and the person having the prior interest; if, for instance, the father tenant for life and the son remainderman in tail, concur together in selling estates, they form

(*a*) *Shaffo v. Adams*, 4 Gif. 492.

(*b*) See the Sale of Land by Auction Act, 1867, 30 & 31 Vict. c. 48; Dart (1888), p. 126; the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 58.

(*c*) See *Shelly v. Nash*, 3 Madd. 232; and *Fox v. Wright*, 6 Madd. 111, where post-obit bonds to raise 40,000*l.* were sold by auction without reserve.

(*d*) Per Lord Cranworth, L. J., 2

Do G. M. & G. 63.

(*e*) *Lord v. Jeffkins*, 33 B. 7.

(*f*) *Moth v. Atwood*, 5 V. 815; *Perfect v. Lane*, 3 Do G. F. & J. 369; but see *Roche v. O'Brien*, 1 Ball & B. 330.

(*g*) *Edwards v. Burt*, 2 Do G. M. & G. 55; see *Edwards v. Browne*, 2 Coll. Ch. R. 100.

(*h*) *Newton v. Hunt*, 5 Si. 511.

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in fact, one vendor, *with a present interest*, and meet a purchaser with the same advantages as if a single person had the whole power over the estate; the onus, therefore, would not lie upon the purchaser, of showing that he gave an adequate price (*c*), unless other circumstances exist which might throw the onus upon the purchaser, as in the case of a purchase by an attorney from his client, or in the case of undue parental influence having been used (*b*).

The rule as to the sale of reversionary interests will not apply in the absence of any circumstances such as those referred to by Lord *Hathcley* in *O'Rourke v. Bolingbroke* (*c*), as where the vendor is entitled to what is substantially an estate in possession, and the reversion subject only to an intervening life estate (*d*), nor where the contract was entered into between a tenant and the person entitled to the reversion and to the rents during the term (*e*). Nor where the sale was of a life interest in possession subject to rent charges which absorbed nearly the whole of the income (*f*).

Where, even before the Sales of Reversions Act (*g*) came into operation, a person dealing with an heir or reversioner showed that the transaction was reasonable, and that a fair price had been given, either for a reversionary interest, annuity, or post obit bond, a Court of equity would not, in the absence of fraud, set it aside (*h*).

When the vendor had stated in his proposals the value of the corpus of the property, it lay upon the vendor, even before the Sales of Reversions Act (*i*), to allege and prove that the value was understated (*k*); and where the vendor refuses all professional advice and presses the sale it will be upheld, although the other circumstances of the case would have justified relief (*l*).

(*a*) See *Wood v. Abrey*, 3 Madd. 422; *Cooke v. Burtchaell*, 2 Dr. & War. 165; *Sibbering v. Earl of Balcarras*, 3 De G. & Sm. 735, 736.

(*b*) *King v. Savery*, 5 H. L. Cas. 627. See also *Hannah v. Hodgson*, 30 B. 19.

(*c*) 2 L. R. H. L., p. 283.

(*d*) *Wardle v. Carter*, 7 Si. 490; cf. *Nesbitt v. Berridge*, 32 B. 282.

(*e*) *Scott v. Dunbar*, 1 Moll. 459.

(*f*) *Webster v. Cook*, 2 Ch. 512; disapproved of by *Stuart*, V.-C., in *Tyler v. Yates*, 11 Eq. 265. And see

Helsham v. Barnett, 21 W. R. 309; *Howley v. Cook*, 8 Ir. R. Eq. 570.

(*g*) *Infra*, p. 318.

(*h*) *Dews v. Brandt*, Ch. Ca. 7; *Batty v. Lloyd*, 1 Vern. 141; *Wharton v. May*, 5 V. 27; *Curling v. Townshend*, 19 V. 634; *Aldborough v. Trye*, 7 Cl. & Fin. 436.

(*i*) *Infra*, p. 318.

(*k*) *Perfect v. Lane*, 3 De G. F. & J. 369.

(*l*) *Harrison v. Guest*, 8 H. L. Cas. 451.

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A fair agreement between expectants or heirs, to divide the property which may be left between them, or to any one of them, is not contrary to public policy, and specific performance has been enforced (a).

3. What Constitutes Inadequacy of Price.

There is no rule in our law as to what difference between the real value of the property and the consideration paid constitutes inadequacy of price; this the judge must decide, having regard to the circumstances existing at the date of the contract, and not to subsequent events (b).

In many cases sales of reversions were set aside for inadequacy where the difference between the assumed value and the price given was very small. Thus in *Edwards v. Brown* (c), where the market value appeared to have been rather more than 1,900*l.*, and the price paid was 1,700*l.* So in the case of *Edwards v. Bart* (d), where the value was taken to be 580*l.*, and the price was 500*l.*, and 50*l.* payable on a future contingency; and see *Jones v. Ricketts* (e), and *Foster v. Roberts* (f), where the M. R. remarked that the tendency of the decisions was to establish *that unless a person gave much more than the value it was impossible, save under a sale by auction, to purchase a reversionary interest with safety.*

When it becomes necessary to consider the value of a reversionary interest, much difficulty arises from the conflicting evidence usually given—on the one hand, by auctioneers and surveyors, who estimate the value by the *market price*; on the other, by actuaries, who generally estimate the value according to the tables. It is, however now fully established, that, in calculating the value of a reversionary interest, the Court will be guided, not by the tables, but by the “market value,” which is generally about two-thirds of the estimated value (g); and in the case of real estate, its nature, position, and other particulars ought to be considered as affecting the value of the interest sold (h).

(a) *Beckley v. Newland*, 2 P. W. 182. See also *Wethered v. W.*, 2 Si. 183; *Harwood v. Tooke*, 2 Si. 192; *Hyde v. White*, 5 Si. 524.

(b) See *O'Rorke v. Bolingbroke*, 2 L. R. H. L., p. 283; *Perfect v. Lane*, 3 De G. F. & J. 369; *Gowland v. De Faria*, 17 V. 20; *Boothby v. B.*, 1 H. & Tw. 214; *Rees v. De Bernardy*, 12 Times L. R. 412. And see (n.) “Sale

by Auction,” *supra*, p. 315.

(c) 2 Coll. Ch. R. 100.

(d) 2 De G. M. & G. 62.

(e) 31 B. 130.

(f) 29 B. 471.

(g) Dart (1888), vol. ii., p. 849, citing *Potts v. Curtis*, You. 543. Sug. 279; *Bettyes v. Maynard*, 31 W. R. 461.

(h) See *Hincksman v. Smith*, 3 Russ. 433; *Headen v. Rosher*, M'Clo. & Yo.

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4. Sales of Reversions Act (31 Vict. c. 4, Dec. 1867).

This Act was passed for abolishing the equitable doctrine which set aside a sale of a reversionary interest *solely* on the ground of inadequacy of consideration, and threw upon the purchaser the onus of proving adequacy. It is carefully limited to purchases made *bona fide* and without fraud or unfair dealing (*a*).

The doctrines of equity as to the relief of expectant heirs (*b*) from unconscionable bargains have not been affected by the repeal of the usury laws or by this statute (*c*).

S. 1. "No purchase made *bona fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue."

S. 2: "The word 'purchase' in this Act shall include every kind of contract, conveyance, or assignment, under or by which any beneficial interest in any kind of property may be acquired."

S. 3: "This Act shall come into operation on the first day in January, 1868, and shall not apply to any purchase concerning which any suit shall be then depending."

"*Bona fide and without Fraud*" (*d*).—"The Act is carefully limited to purchases made *bona fide*, and without fraud or unfair dealing, and leaves undervalue still a material element in cases in which it is not the sole equitable ground of relief. These changes in the law *have in no degree whatever* altered the *onus probandi* in those cases which, according to the language of Lord *Hardwicke*, arise from the *circumstances* or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advan-

89; *Newton v. Hunt*, 3 Si. 311; *Wardle v. Carter*, 7 Si. 490; *Ryle v. Swindells*, M'Cle. 519; *Edwards v. Browne*, 2 Coll. Ch. R. 100; *Davies v. Cooper*, 3 My. & C. 270; *Aldbrough v. Trye*, 7 Cl. & Fin. 436; *Bernal v. Donegal*, 3 Dow, 133; *Edwards v. Burt*, 2 De G. M. & G. 33, 37; *Perfect v. Lane*, 3 De G. F. & J. 369; *Tynte v. Hodge*, 2 Hem. & M. 257.

(*a*) See s. 1, *supra*, and note thereon.

(*b*) See note, "Expectants; Expectant Heirs," *supra*, p. 309, and *Nevill v. Snelling*, there cited.

(*c*) *Earl of Aylesford v. Morris*, 8 Ch. 484; *James v. Kerr*, 40 C. D. 460.

(*d*) See s. 1, *supra*.

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take taken of that weakness—a *presumption of fraud*. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions, and when the relative position of the parties is such as *permit* *prima* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable" (a).

In *Miller v. Cook* (b) the defendant, a money-lender, having agreed with the plaintiff, who was just twenty-one years of age, and was in difficulties, to lend him 150*l.* on his reversionary interest under his father's will, exacted securities for 200*l.*, with interest at 20 per cent., reducible to 10 per cent. on punctual payment, and advanced only 123*l.*, but claimed interest on the whole amount secured, and there were immediate powers of sale on non-payment of principal and interest upon a certain day. The plaintiff had been assisted by Mr. Ring, a solicitor, who, however, stated that he had not been accurately informed of the transaction. *Stuart*, V.-C., held, that the transaction being unconscionable, the deeds executed by the plaintiff should only stand as securities for the moneys actually advanced with interest at 5 per cent. "As to the argument," said his Honor, "on the recent statute, concerning dealings with reversionary interests, the exception in the statute as to unfairness leaves the settled law as to cases like the present untouched. Nor is the case of the defendant assisted by the presence of Mr. Ring, who appeared as the plaintiff's friend. The evidence shows that the advice of Mr. Ring was founded on misunderstanding or misrepresentation. * * * In the present case, besides the other objections to the contract, the terms of the powers of sale are oppressive, and put the plaintiff completely at the mercy of the defendant. The power to sell without any notice to the plaintiff enabled the defendant at any moment to extinguish the right of redemption."

In *Tyler v. Yates* (c), where a young man charged a reversion with exorbitant sums for interest on loans principally made to his brother, an infant, on bills of exchange which he had accepted for the infant, it was held by *Hatherley*, C., affirming the decision of *Stuart*,

(a) Per *Selborne*, C., in *Earl of Aylesford v. Morris*, 8 Ch. 490; *O'Rourke v. Bolingbroke*, 2 App. Cas., p. 833; *Fry v. Lane*, 40 C. D. 312; *James v. Kerr*, 40 C. D. 449; and see *O'Rourke v. Bolingbroke*, *infra*, p. 322; *Rae v. Joyce*, 29 L. R. Ir. 500.
(b) 10 Eq. 641.
(c) 11 Eq. 265; 6 Ch. 665.

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V.-C., that the charges so given should stand as security for the sums actually advanced with interest at 5 per cent. (a).

"*Any Reversionary Interest*" (b).—In *Earl of Aylesford v. Morris* (c) the plaintiff, then a young nobleman in his twenty-second year, entitled to a large property in the event of his surviving his father, being largely indebted, upon the introduction of a creditor applied to Morris, who advanced 3,000*l.* in payment of the debt, and 3,800*l.* to the plaintiff, taking his acceptance at three months for 8,000*l.*, the difference, 1,200*l.* being retained by Morris as discount at the rate of 1*s.* in the pound per month. At the same time an insurance was effected on the plaintiff's life for 6,000*l.*, the first premium being paid by the plaintiff out of the money advanced. The acceptance of 8,000*l.* becoming due on the 4th Oct., 1870, the plaintiff, through the agency of one Addison, had his acceptance of 8,000*l.* cancelled, giving Morris bills dated the 19th Dec. at three months for 11,000*l.* and receiving a balance of 207*l.* only, the rest of the money beyond the 8,000*l.* being for discount, extra payment on the policy of assurance, and 27*s.* commission paid to Addison. The plaintiff had no professional assistance in these matters, and no application was made to his father or to the solicitor of the father. *Selborne*, C. held, affirming the decree of *Wickens* V.-C., that a decree ought to be made for delivering up the bills on payment of the sums actually advanced and interest at 5 per cent. (d).

In *Webster v. Cook* (e), the plaintiff being entitled to a life interest in an estate, subject to two jointures of 1,000*l.* and 500*l.* a year, and to a mortgage of 23,000*l.*, by indenture dated the 17th August, 1864, in consideration of 1,000*l.*, covenanted to pay the defendant 3,300*l.* on the death of the jointress having the jointure for 1,000*l.* a year, and in the meantime interest at 1*l.* per cent. per annum until her death, and after her death at the rate of 10*l.* per cent. until the sum was paid. He also covenanted to insure his life for 3,500*l.*, and pay the premiums thereof. He further assigned his life interest by way of security for the payment of the 3,000*l.*, interest and premiums, with a provision for redemption on payment of 1,500*l.* on the 17th

(a) See also *Re Slater's Trusts*, 11 C. D. 227; decided on petition, *Novill v. Snelling*, 15 C. D. 679; *Fry v. Lane*, 40 C. D. 312; *James v. Kerr*, 40 C. D. 449.

(b) See s. 1, *supra*.

(c) 8 Ch. 484.

(d) See notes, "Expectants, Expectant heirs," *supra*, p. 309, and "Extension of the principle," *supra*, p. 313.

(e) 2 Ch. 342.

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of August, 1865, or the sums of 1,850*l.* on the 17th of August, 1866, with all interest and premiums up to those days respectively. By a memorandum on 5th January, 1865, he agreed that a debt of 400*l.* due from him with interest at 5*l.* per cent. per month should be tacked to the security of the said indenture of the 17th of August. The plaintiff was in urgent distress for money, and without professional advice when he contracted the loan, and his clear income from the estate afterwards was about 215*l.* On the 1st of July, 1865, his solicitors wrote to the defendant, offering to redeem on payment of the sum actually advanced and interest at 5*l.* per cent., and on not receiving any answer filed a bill to redeem on those terms. *Romilly* M.R., treating the transaction as the sale *pro tanto*, of a reversion on the death of the jointress at an inadequate value, was of opinion that the mortgage and assignment made to secure it must be cancelled, and the property reconveyed on payment of the principal sum advanced, together with interest at 5*l.* per cent. per annum from the date of the advance, but refused to give any relief as to the 400*l.* *Chelmsford*, C., on appeal reversed the order of the M.R., made a decree for redemption on payment of 1,500*l.*, with interest at 4*l.* per cent. on the sum of 3,500*l.* down to the 17th August, 1865, and afterwards on 1,500*l.* at 5*l.* per cent., and of the sums paid by the defendant for premiums with interest thereon, and of the sum of 400*l.* and interest thereon at the rate of 5*l.* per cent. per month. His Lordship said that if it had been the case of the sale of a reversion he should have had no difficulty in determining that there was sufficient evidence adduced by the plaintiff of the inadequacy of price, and the onus would have been upon the defendant to prove that the transaction was reasonable. But his Lordship was at a loss to discover what reversion there was in the plaintiff, for which the parties could be said to have dealt, that the policy of law which throws its protection round all reversioners, might be questionable, and has been questioned, and that the principle ought not to be extended by analogy.

The decision of Lord *Chelmsford* has been strongly disapproved of by *Stuart*, V.-C., who considered it was decided upon a mistake, and therefore could not be looked upon as a case of authority (a).

Parties taking with notice a transfer of securities impeachable as

(a) *Tyler v. Yates*, 11 Eq. 276; and see note, "Extension of the principle," *supra*, p. 313.
Helsham v. Barnett, 21 W. R. 309;
Howley v. Cook, 8 Ir. R. Eq. 570;

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unconscionable, will be bound by the same equities as the parties to the original transaction (a).

"*Merely on the ground of undervalue*" (b).—The rule as to non-interference after conveyance is now the same, whether the estate sold be in possession or a reversion, and as in the former case, the inadequacy may be so great as of itself to furnish evidence of fraud (c), so notwithstanding the Act the same rule also applies with equal (d) force to the purchase of a reversionary interest (e). Undervalue is, therefore, still a material element in cases in which it is not the sole ground of relief (f), and it may be the sole ground for relief when the inadequacy is so great as of itself to amount to evidence of fraud (g).

But in determining whether the contract is a hard one, the point to be considered is, not so much the *quantum* of the consideration as the fairness of the transaction generally (h). Although the onus lies with the purchaser of showing that there was nothing unconscientious on his part if he succeeds in doing so and the bargain appears to have been made *bona fide*, and without fraud or unfair dealing, then, although the price is in fact inadequate, the transaction will not be set aside: *O'Rorke v. Bolingbroke* (i). In this case Lord *Hatherley*, agreeing with the Court below, thought the whole case ought to be opened upon the ground that the expectant, although the defendant had suggested his employment of a solicitor, had not on account of his poverty employed one, whereas if he had done so, he would probably have pointed out the very bad health of his father, upon whose death shortly after the reversion fell into possession, and have either obtained a better price for the sale of the reversion, or have suggested a loan in lieu thereof. But the majority of the Court took the view that although the price was inadequate, and although there was no independent advice, yet the particular circumstances of the case sufficiently

(a) *Nesbitt v. Berridge*, 4 De G. J. & S. 45; *Tottenham v. Green*, 1 N. R. 166.

(b) See s. 1, *supra*.

(c) See note, "Inadequacy of price," *supra*, p. 308.

(d) ? Greater force, see *Fry v. Lane*, 40 C. D. 312.

(e) *Dart, V. & P.* (1888), vol. ii., p. 851; *Fry v. Lane*, *supra*.

(f) *Earl of Aylesford v. Morris*, 8 Ch., p. 491.

(g) See judgment of Lord *Thurlow*, *Gwynne v. Heaton*, 2 Bro. Ch. 8, *supra*, p. 309.

(h) *Middleton v. Brown*, 47 L. J. Ch. 411; *O'Rorke v. Bolingbroke*, *infra*.

(i) See *O'Rorke v. Bolingbroke*, 2 App. Cas. 814—836, where the majority of the House of Lords, consisting of Lords *Blackburn*, *Gordon*, and *O'Hagan*, Lord *Hatherley*, *diss.*, reversed the decision of the C. of A., *Ireland (Ball, C., and Christian, L.J.)*.

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explained these suspicious circumstances, and that the purchaser had discharged the onus thrown upon him by showing that the transaction was a fair one.

5. As to the terms upon which an Unconscionable Bargain will be set aside.

Actions to set aside unconscionable bargains are treated as redemption actions (*a*), and relief is given upon payment of the sum actually advanced, with interest, usually at 5*l.* per cent. (*b*) ; money expended by the defendant in lasting and valuable improvements on the premises, and costs (*c*), except the costs of an unsuccessful reference as to value (*d*).

In *James v. Kerr* (*e*) the mortgagee was disallowed a bonus, which the mortgagor had covenanted to pay, as being a collateral advantage (*f*). In *Pennell v. Millar* (*g*) a mortgagee was disallowed what he had paid for premiums on life policies (*h*).

And in default of payment of principal and interest and costs if allowed to the defendant, the action will be dismissed with costs (*i*).

Misconduct on the part of the defendant has been held to disentitle him to costs (*k*) ; so, where he has refused proper terms

(*a*) Seton (1893), p. 1950.

(*b*) *Earl of Aylesford v. Morris*, 8 Ch. 484 ; *Tyler v. Yates*, 6 Ch. 665 ; *Miller v. Cook*, 10 Eq. 641 ; *Fry v. Lane*, 40 C. D., p. 325 ; *James v. Kerr*, 40 C. D., p. 461 ; *Rae v. Jocye*, 29 L. R. Ir. 500.

(*c*) *Murray v. Palmer*, 2 Sch. & L. 190 ; *Salter v. Bradshaw*, 26 B. 161 ; *Twistleton v. Griffith*, 1 P. W. 310 ; *Gwynne v. Heaton*, 1 Bro. Ch. 1 ; *Peacock v. Evans*, 16 V. 512 ; *Wharton v. May*, 5 V. 27 ; *Curling v. Townshend*, 19 V. 633 ; *Bowes v. Heaps*, 3 V. & B. 117 ; *Evans v. Cheshire*, Bell's Suppl. to V. 312 ; *Fox v. Wright*, 6 Madd. 111 ; *Bawtree v. Watson*, 3 My. & K. 311 ; *Miller v. Cook*, 10 Eq. 641.

(*d*) *Boothby v. B.*, 15 B. 212, 214 ; *Edwards v. Burt*, 2 De G. M. & G. 55, 65 ; *Jones v. Rickotts*, 21 B. 130.

(*e*) 40 C. D. 449, and see *Roes v. De Bernardy*, 12 Times L. R. 412.

(*f*) And see *Mainland v. Upjohn*, 41 C. D. 126 ; and see Coote, *Mortgages* (1884), vol. i., p. 16.

(*g*) 23 B. 172.

(*h*) And see *Bromley v. Smith*, 26 B. 644 ; *Fry v. Lane*, 40 C. D. 325 ; *Darcy v. Croft*, 9 Ir. Ch. R. 19 ; and cf. *Leslie v. French*, 23 C. D. 552 ; explained *Re Winchelsea's Policy Trusts*, 39 C. D. 168 ; *Earl of Aylesford v. Morris*, 8 Ch. 498, Seton (1893), p. 1948, Form 3.

(*i*) *Croft v. Graham*, 2 De G. J. & S. 155, Seton (1893), p. 1947, Form 1 ; *Bonyon v. Fitch*, 35 B. 570, 578 ; *Earl of Aylesford v. Morris*, 8 Ch. 498, Seton (1893), p. 1948, Form 3.

(*k*) *Baugh v. Price*, 1 Wils. 320 ; *Gowland v. De Faria*, 17 V. 20 ; *Moroney v. O'Dea*, 1 Ball & B. 109, and the reporter's note ; *Wood v. Abrey*, 3 Madd. 417 ; *Bawtree v. Watson*, 3 My. & K. 339 ; *Tyler v. Yates*, 11 Eq. 265.

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before the suit was instituted, he has been compelled to pay the costs of litigation which he rendered necessary (*a*), and so where he has been guilty of fraud or misconduct (*b*). But compound interest will never be allowed to the purchaser (*c*).

If no moral fraud has been proved, and the charges of misconduct go further than the evidence warrants, no costs will be given (*d*), or the plaintiff may be ordered to pay the costs (*e*). Sometimes where the ground of relief was undervalue only, the plaintiff has obtained relief only on payment of costs (*f*). As to costs generally, see *Bennett v. Smith* (*g*). On the other hand, the purchaser will be charged with what he has actually received and interest, but it seems he will not, like a mortgagee, be charged with what without wilful default he might have received (*h*). As to the terms on which relief was given as against a sub-purchaser with notice, see *Addis v. Campbell* (*i*).

Accounts settled for the purpose of advances on post-obit bonds, or mortgages of reversionary interests, will not be treated as settled accounts (*k*).

6. Confirmation and Acquiescence.

Impeachable transactions may be rendered valid by acts of confirmation (*l*), especially when of a formal character after advice taken (*m*), as by will or deed (*n*), or acquiescence for a great length of time (*o*) on the part of a person who is cognisant of his right to relief (*p*); for

(*a*) *Benyon v. Fitch*, 35 B. 570, 578; *Benyon v. Cook*, 10 Ch. 389; *Nevill v. Snelling*, 15 C. D. 705; *Wyatt v. Cook*, 16 W. R. 502.

(*b*) *Howley v. Cook*, 8 Ir. R. Eq. 570.

(*c*) *Gowland v. De Faria*, 17 V. 20.

(*d*) *Fry v. Lane*, 40 C. D., p. 524.

(*e*) *St. Albyn v. Harding*, 27 L. 11; but see *Tyler v. Yates*, 11 Eq. 365; *O'Rourke v. Bolingbroke*, 2 App. Cas. 814.

(*f*) *Twistleton v. Griffith*, 1 P. W. 310; *Bawtree v. Williams*, 3 My. & K. p. 341; *Dart. V. & P.* (1888), p. 854.

(*g*) 26 B. 644.

(*h*) *Murray v. Palmer*, 2 Sch. & L. 489; but see the decree, *ib.*, contra. 490; *Re Slater's Trusts*, 11 C. D. 227.

(*i*) 4 B. 401, *infra*, p. 325.

(*k*) *Croft v. Graham*, 5 Gif. 1; *Tottenham v. Green*, 1 N. R. 466. As to deductions for commission and bonus, see *Mainland v. Upjohn*, 41 Ch. D. 126; *The Benwell Tower*, 72 L. T., p. 670.

(*l*) *Cole v. Gibbons*, 3 P. W. 289.

(*m*) *Lyddon v. Moss*, 4 De G. & J. 104.

(*n*) *Stump v. Gaby*, 2 De G. M. & G. 623.

(*o*) *Sibbering v. Earl of Balcarras*, 3 De G. & S. 735; *Addis v. Campbell*, 4 B. 401; *Lord v. Jeffkins*, 35 B. 7; *Turner v. Collins*, 7 Ch. 329.

(*p*) See *supra* p. 286, and *Gerrard v. O'Reilly*, 3 Dr. & Wal. 414; *Rees v. De Bernardy*, 12 Times L. R. 412.

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it has been well said "that the presumption which a Court of justice most probably entertains against stale demands *(a)* can never be more properly applied than in a case where the burden of proof upon a most material point in controversy is thrown upon the defendant" *(b)*.

But confirmation or acquiescence must be founded on full knowledge of the facts, and must be in relation to a transaction to which effect may be given thereby *(c)*, and it will be of no avail whilst the plaintiff continues in the same situation as when he entered into the contract, for in such cases it has always been presumed, that the same distress, which pressed him to enter into the contract, prevented him from coming to set it aside; it is only when he is relieved from that distress that he can be expected to resist the performance of the contract *(d)*; and in *Curry v. Milder* *(e)* relief was given even after payment of the money due on a post-obit bond, the payment having been made from fear of an execution.

In *Rae v. Joyce* *(f)* a mortgage was held a hard and unconscionable bargain, although the deed was approved by the married woman's solicitor, and was duly acknowledged.

So, where a person bought a reversion at a gross undervalue, from an heir in distressed circumstances and resold it at a large profit to a sub-purchaser who had full notice of the original fraud, and the reversioner being still in distress, was induced by the original purchaser to join in and confirm the re-sale, and to concur in suffering recoveries which were necessary to perfect the title, but nothing was paid or secured to him as a consideration for such concurrence, the transaction was set aside as against the sub-purchaser on the repayment of the price paid on the first purchase *(g)*.

Where, moreover, a sale of a reversion has taken place at undervalue time will not begin to run against the vendor until the

(a) See *Salter v. Bradshaw*, 26 B. 161, *infra*, and the judgment of *Lindley, J.*, in *Allcard v. Skinner*, 36 C. D., p. 186.

(b) 3 De G. & Sm. 737.

(c) *La Banque Jacques-Cartier v. La Banque d'Epargne, &c.*, 13 App. Cas. P. C. 111; *Lyddon v. Moss*, 4 De G. & J. 104.

(d) *Gowland v. De Faria*, 17 V. 20, cited with approval by *Kay, J.*, in *Fry v. Lane*, 40 C. D., p. 324; *Ray v. Joyce*, 29 L. R. Ir. 500; *Medlicott*

v. O'Donel, 1 Ball & B. 156; *Kendall v. Beckett*, 2 Russ. & M. 88; *Edwards v. Browne*, 2 Coll. Ch. R. 100; *Kempson v. Ashbee*, 10 Ch. 15; *Beynon v. Cook*, 10 Ch. 393 n. See *Huguenin v. Baseley*, *supra*, p. 247; *Fox v. Mackintosh*, *post*, and *note*.

(e) 3 P. W. 292, n.

(f) 29 L. R. Ir. 500.

(g) *Addis v. Campbell*, 4 B. 401; and see *King v. Savery*, 1 Sm. & G. 271; 3 H. L. Cas. 627; *Wright v. Vanderplank*, 2 Jur. (N. S.) 599.

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reversion falls into possession. See *Salter v. Bradshaw* (a), in which case the transaction was set aside after the lapse of forty years (b).

Where a transaction is not merely voidable or impeachable, but is absolutely void, upon principles of public policy, then, as is laid down by Lord *Hardwicke* in the principal case, it is incapable of confirmation. Thus, a usurious contract was, and a marriage brokerage contract still is, void *ab initio*, and does not admit of confirmation (c).

Infants' Relief Act, 1874.—By this Act (d), which came into operation on the 7th of August, 1874, it is enacted :

S. 1. "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities) and all accounts stated with infants, shall be absolutely void, provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity enter, except such as now by law are voidable."

S. 2. "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age" (e).

(a) 26 B. 161.

(b) See also *Beynon v. Cook*, 10 Ch. 393; *Allicard v. Skinner*, 36 C. D., p. 186.

(c) *Shirley v. Martin*, 3 P. W. 74 n.; *Cole v. Gibson*, 1 V. 506, 507.

(d) 37 & 38 Vict. c. 62.

(e) See as to the effect of this Act, *Simpson, Infants* (1890), Ratification, ch. 3, p. 67; *Ex p. Kibble*, 10 Ch. 373; *Ex p. Jones*, 18 C. D. 109; *Cox-*

head v. Mullis, 3 C. P. D. 439; *Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worrall*, 3 C. P. D. 410; *Brown v. Harker*, 68 L. T. 488; *Holmes v. Brierley*, 59 L. T. 70; *Valentini v. Canali*, 24 Q. B. D. 166; *Hamilton v. Vaughan-Sherrin*, 10 Times Rep. 642; *Smith v. King*, (1892) 2 Q. B. 543; *Edwards v. Carter*, (1893) A. C. 360.

CONVERSION (a).

FLETCHER v. ASHBURNER.

June, 1779. 1 Bro. Ch. 497.

Conversion.

Where a real estate is ordered to be sold, it becomes personalty, and shall go accordingly.

JOHN FLETCHER, by his will devised his burgage houses and free rents in Kendal, and all his personal estate, to trustees and the survivor, and the heirs, executors, and administrators of such survivor, in trust to sell so much as should be sufficient to pay his debts, and then to permit his wife Agnes to enjoy the residue during her life, if she so long continued his chaste widow, and after her decease, to sell and dispose thereof, and the money arising thereby, after deducting charges, and half-a-guinea each to the trustees for their trouble, to pay to and between his son William and daughter Mary, share and share alike; provided, that if his wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his son William, and daughter Mary, share and share alike equally; and in case either his son William or his daughter Mary should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them.

The testator died, leaving Agnes his widow, William his only son and heir-at-law, and Mary his daughter.

Agnes, by the custom of burgage tenure, was entitled to hold the burgage houses in Kendal during her chaste widowty, against the disposition of her husband by will.

Mary attained twenty-one, but died unmarried, in the life of her

(a) As to conversion between tenant for life and remainderman, see *Howe v. Dartmouth*, p. 68, ante.

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mother and brother. William was twenty-one at the death of the testator and died without issue, in the life of his mother, the mother died the widow of the testator.

Upon her death a bill was filed by the heir-at-law of William, and John the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates devised by the will to the plaintiff, the heir-at-law.

The representative of the widow, who was the sole next of kin of William, the son by answer claimed the property as personal, alleging, that, by the direction to the trustees to sell the real estates, they became as personal property, and, as such, were to go to the personal representative of William, the son, who survived his sister.

The cause was heard the 11th December, 1778, where the first objection taken was, that the personal representative of William was not before the Court.

But Sir THOMAS SEWELL, M.R., was of opinion there were sufficient parties to sustain the question; that the personal representative was a mere formal party; and that, if he thought proper to make a decree, a personal representative might be brought before the Master.

Mr. *Hudocks* and Mr. *Wilson* further argued, with respect to the principal question, that the real estates devised by the will were still to be considered as real estates, and to go to the real, not the personal, representative: that it was clear the intention of the testator that the estate should remain, and, whilst it did so, was to be enjoyed by one person, and he directed it to be sold merely for the purpose of a division; that, in consequence of the death of the daughter no division was to be made, and therefore the reason for the directions ceased; and, from thence forth, the son alone becoming entitled, upon the death of his mother, it was to be considered as land. They relied upon the case of *Flanagan v. Flanagan*, 8th June, 1768, before Lord *Candlish*, which was a devise of real and personal estate to trustees in trust, out of the personal estate, and by sale of a sufficient part of the real, to pay debts; the surplus, after payment of debts, to A. A suit was instituted for payment of the debts, and the real estates decreed to be sold; part was sold: and afterwards A. died leaving a son and daughter; the cause was revived against the son; and it being apprehended that sufficient was not sold to pay the

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debts a further part of the real estate was sold under the order of the Court. It was afterwards proved that the money produced by the first sale was sufficient to pay the debts, the question was, whether the heir or the personal representative was entitled to this money. It was alleged by Mr. *Wilson*, who cited the case that Lord *Camden's* determination was, that whatever quality the fund then had, such it should retain; and he decreed for the personal representative. The other cases mentioned were *Cruse v. Barley* (a) and *Digby v. Legard* (b).

Mr. *Kenyon* and Mr. *Chamberlain* (on behalf of the defendants, the executors of the widow), contended that the testator had, by his will, directed the real estate, after the death of his widow, to be sold and blended with his personal estate, and the whole to be divided between his children, or in case either of them should die in the life of his wife, to the survivor. Upon the case of *Flanagan v. F.* it was observed that the Court determined the produce of the real estate to be considered as personal, because the Court had itself directed the sale to be made and the property to be charged for payment of debts. The cases of *Digby v. Legard* and *Cruse v. Barley* were treated as inapplicable to the present case, being cases of lapsed devises: *Durour v. Motteux* and *Mottobur v. M.* were cited, as decisive of the question in favour of the defendants.

Sir THOMAS SEWELL, M.R., in June, gave his opinion. He observed, that nothing was better established than this principle: that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money or money land. The cases established this rule universally.

If any difficulty has arisen, it has arisen from special circumstances. In the case of *Sweetapple v. Bindon* (c), it was determined

(a) 3 P. W. 20.

(b) 3 P. W. 22.

(c) 2 Vern. 536.

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that a husband was entitled to money to be laid out in land, as tenant by the curtesy: and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held, because cases have been determined, and not from any principle.

The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land.

The principal cases have been where real estates have been directed to be sold, and some part of the disposition has failed; so that something has resulted to the heir-at-law, as in the cases of *Emblyn v. Freeman* and *Cruse v. Barley*. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir-at-law of the testator.

The case of *Durour v. Mottour* is a strong case to the point now before the Court, and, if anything could strengthen the general rule, the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of *Durour v. Mottour*, Lord *Hardwick* made this a principal ground for considering the whole fund as personal estate; in the present case it might be uncertain, till the death of the widow, whether the estates must not be absolutely sold; both the children, indeed, died before her; but she might have married before the death of one or both. The interests of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother.

There could be no election to take the fund as land or money; for, where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold (a); the question, therefore, is merely between the real and personal representatives of the son, whether the personal representative shall take the fund as personal property, according to the will, or the heir-at-law shall take it, as if no will had been made.

The case of *Flanagan v. F.* (b) is a strong authority that it shall be taken as a personal estate, according to the will. In that

(a) See also *Deeth v. Hale*, 2 Moll. 317; *Smith v. Claxton*, 4 Madd. 193; *Chalmer v. Bradley*, 1 J. & W. 59; *Trower v. Knightley*, 6 Madd. 134.

plained by Mr. Scott arguendo in *Ackroyd v. Smithson*. Approved also by *Jessel, M.R.*, in *Steed v. Preece*, 18 Eq. 196.

(b) 1 Bro. Ch. 50, cited and ex-

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case the testatrix, Sarah Wooley, by will, dated 28th March, 1749, gave and devised all her real and personal estates to Francis Plumtree, in trust, in the first place, out of her personal estate, as far as it would extend, and, in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and, after payment thereof, in trust to convey the residue of the real estate which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father, James Flanagan, and her brother, James Flanagan, their heirs, executors, and administrators, equally. A bill was brought by the creditors for sale of the real estate, to supply the deficiency of the personal estate, for payment of debts, and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to James Flanagan, the father, and James Flanagan the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs, equally; after the decree, James Flanagan, the son, died leaving a daughter, and a son, born after his death; part of the estate was sold, and afterwards, James Flanagan, the grandfather, died, leaving his grandson his heir, and his grandson and granddaughter his sole next of kin; after the death of the grandfather, a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies: it appeared, however, that the produce of the first sale was sufficient. A bill was afterwards brought by the son of James Flanagan, the son claiming a moiety of the surplus, as the real estate of James Flanagan, his grandfather, to whom he was become heir, against the personal representative of his grandfather, and against the daughter of James Flanagan, the son, who claimed a moiety as one of the next of kin of her grandfather. It was objected, that the second sale, after the death of the grandfather, was improper. The Court determined, that the second sale, *actually made under the decree of the Court*, before the Master, could not be considered as improperly made, that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather. The case of *Doddy v. Legard* is a different question. There the testatrix (Elizabeth Byerley) directed her real estate to be sold to pay debts and legacies,

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and gave the residue to five persons, to be equally divided between them, one of whom (Lady Claycy) died in her lifetime. It was resolved that the devise so far, failed totally, and should accrue to the heir-at-law. The language of the decree is such, that the benefit of the devise to Lady Claycy should accrue to the testatrix's heir-at-law, Mr. Jervoise who was a lunatic, and should be paid to his committee, as real estate descended to him. The case of *Scudamore v. Scarborough* shows that in all cases where the dispute is between representatives the heir or executor shall have the fund, according to the will or contract of the persons who gave or created it.

There was a case of *Ogle v. Cook* (a), heard 12th February, 1748, which was this: Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell and to vest the money in stock, and pay the interest to his wife during the widowhood, and after her death, or marriage, to his two daughters equally, except that the eldest was to have 1000*l.* more than the other; he gave the residue of his personal estate in the same way. He afterwards conveyed the real estate to one of the trustees named in his will to whom he was considerably indebted, in trust to sell so much as should be necessary to pay the debt, and as to the residue in trust for Mrs. Ogle: part of the estate was sold, and then Mr. Ogle died. His youngest daughter died in his lifetime. The bill was brought by the widow and the eldest daughter, against the son who was the heir, and the trustees, to have the residue of the estate sold and claiming the share of the youngest daughter, as personal estate of Mr. Ogle, to be divided between them and the son as his next of kin. The son insisted the conveyance to the trustee was a revocation of the will; and, if not, that the share of the dead daughter was to be considered as real estate of Mr. Ogle, and descended to him as heir. It was determined that the conveyance was a revocation only *pro tanto*, to let in the debt; and that so much of the estate as remained unsold, should be sold, and that the money raised, or to be raised, by sale of the estate, made part of the personal estate of Mr. Ogle. There was another case about the same time which is in 1 V. 174 (b), where by marriage articles 500*l.* was agreed to be laid out in purchase of lands, to be settled to

(a) See *Collins v. Wakeman*, 2 V. jun. 636, where Lord *Loughborough* says, that he had caused the Reg. Lib. to be examined, and it was found that

the point supposed to have been decided by *Ogle v. Cook* was in reality left undecided.

(b) *Cunningham v. Moody*.

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the use of the husband for life, with remainder to trustees to provide for contingent remainders, with remainder to the wife for life, and remainder to the children of the marriage, as the husband and wife should appoint; and in default of a joint appointment as the survivor should appoint; and in default of any appointment to the children, to be equally divided among them, if more than one, as tenants in common, in tail general, with cross remainders, and if but one, to that child in tail general; and no appointment was made. The father and mother being dead, and the daughter being married, the trustees paid the 500*l.* to her and her husband, and they received it as money, and executed a release. The daughter had a child, which died, and she afterwards died without issue. A daughter of the settlor, by a second marriage, filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the 500*l.* considering it as land; and it was observed, that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest during his life, as tenant by the curtesy.

In the present case, William Fletcher, the son, had the whole beneficial title vested in him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money. The bill must, therefore, be dismissed without costs.

NOTES.

1. Generally.
2. Conversion of money into land by contract or will, p. 334.
3. Conversion of land into money, p. 339.
4. When conversion takes place, p. 341.
5. Conversion for fiscal purposes, p. 349.
6. Of the period at which conversion commences, p. 351.
7. Election to take property unconverted, p. 357.
8. Conversion by the Court or third parties, p. 364.

1. Generally.

In the judgment of Sir *Thomas Stowell* in the principal case, the equitable doctrine of constructive conversion, which now applies to all Divisions of the High Court (*a*), is thus accurately stated, viz. "When money directed to be employed in the purchase of land, and the

(a) Judicature Act, 1873, s. 23, s. 4, 11.

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directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given—whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land:” see *Whiddale v. Partridge* (a).

The doctrine of conversion proceeds upon the principle, *that equity considers “what ought to have been done shall be taken as done*, and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, turn land into money.” It follows, that the neglect of trustees to perform their duty, either by converting land into money or money into land, will not affect the rights of others: *Lechmere v. Carlisle* (b), *Scudamore v. S.* (c).

The law of conversion appears to be the same in Scotland as in England (d). As to foreign lands, see *Re Piercey* (e).

As to conversion of land for partnership purposes, see *Lake v Craddock*, post.

2. Conversion of Money into Land by Contract or Will.

Money agreed or directed to be laid out in land, becomes land so completely, as to acquire all the properties of land; thus it will be considered as real and not personal assets. Such money would not, previously to 3 & 4 Will. 4, c. 104, have been liable to the payment of the debts of B. by simple contract (f). But it would be bound as real assets by a judgment (g). However, since the passing of 3 & 4 Will. 4, c. 104, such money will be liable, as other *real assets*, to the payment of simple contract debts; and will be subject to tenancy by the curtesy; thus, in *Sweetapple v. Bindon* (h), where A. bequeathed 300*l.* to be laid out in land, and settled to the use of her daughter and her children, and if her daughter died without issue, to go over, the husband of the daughter was held to be tenant by the curtesy, although no purchase had been made during his wife’s lifetime (i).

(a) 5 V. 396; 7 R. R. 37.

(b) 3 P. W. 222.

(c) Pr. Ch. 543.

(d) *Buchanan v. Angus*, 4 Macq. II. L. Cas. 374.

(e) (1895) 1 Ch. 83.

(f) *Whitwick v. Jermin*, Lawrence v. Beverley, cited in *Baden v. Pen-*

broke, 2 Vern. 58; *Fulham v. Jones*, cited *Pulteney v. Darlington*, 7 Bro. P. C. 530; *Foone v. Blount*, Cowp. 467.

(g) *Frederick v. Aynscombe*, 1 Atk. 392.

(h) 2 Vern. 536.

(i) And see *Cunningham v. Moody*,

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But by a singular anomaly, founded on precedent rather than reason (*a*), a woman was not dowable out of such money (*b*); but now by 3 & 4 Will. 4, c. 105, women married after the 1st of January, 1834, whose dower has not been barred, will be dowable out of *equitable estates* (*c*), and possibly they may be held dowable out of money to be laid out in lands of inheritance.

Money agreed or directed to be laid out in land will pass under a general devise of all the lands of the person entitled to it (*d*), or by a devise of "all his lands in a particular country or elsewhere" (*e*).

But such money, if it continue impressed with the character of land, will not pass as *money* by a general bequest to a legatee in exercise of a power or not; though it will by a particular description, as so much money to be laid out in land, or "as so much money left me by the will of A." (*f*).

Although previously to the late Wills Act (which enacts, that no will of an infant shall be valid), infants of the age of fourteen years might by will have disposed of their personalty, they could not, by will, have disposed of money directed to be converted into land (*g*).

Fiscal Duties.—See Conversion for fiscal purposes, p. 349.

Escheat, &c.—Money agreed or directed to be laid out in land, and settled upon a person in fee, will not upon his death without heirs be converted in equity, so that it should escheat to the Crown (*h*), or to a mesne lord (*i*); nor was such money forfeited on conviction for felony (*k*).

1 V. 174; *Dodson v. Hay*, 3 Bro. Ch. 404; *Follett v. Tyrer*, 14 Sm. 125.

(*a*) See the judgment *supra*, p. 329.

(*b*) *Cunningham v. Moody*, 1 V. 176; *Crabtree v. Bramble*, 3 Atk. 687; but see *Fletcher v. Robinson*, Pr. Ch. 250; S. C., 2 P. W. 709; *Otway v. Hudson*, 2 Vern. 583; *Banks v. Sutton*, 2 P. W. 700; *Re Lismore*, 1 Hog. 177.

(*c*) See *Re Michell*, (1892) 2 Ch., p. 99.

(*d*) *Greenhill v. G.*, 2 Vern. 679, Pr. Ch. 320; *Guidot v. G.*, 3 Atk. 256; *Rashleigh v. Master*, 1 V. jun. 201; S. C., 3 Bro. Ch. 99; *Biddulph v. B.*, 12 V. 161; *Green v. Stephens*, 17 V. 77; *Re Scarth*, 10 C. D. 499.

(*e*) *Lingen v. Sowray*, 1 P. W. 172.

(*f*) *Cross v. Addenbrook*, 3 P. W. 222, n.; *Edwards v. Warwick*, 2 P. W. 171; *Gillies v. Longlands*, 4 De G. & Sm. 372; *Chandler v. Porcock*, 15 C. D. 491, 16 C. D. 648; *Re Kingston*, 5 L. R. Ir. 169; *Cookson v. C.*, 12 Cl. & Fin. 121; *Re Groaves*, 23 C. D. 316; *Jarman* (1893), p. 548; *Re Cleveland's S. E.*, (1893) 3 Ch. 244.

(*g*) *Earlom v. Saunders*, Amb. 241.

(*h*) *Walker v. Denne*, 2 V. jun. 170, 185.

(*i*) *Burgess v. Wheate*, 1 Eden, 177; *Henchman v. A.-G.*, 3 My. & K. 483, 494. See *Ackroyd v. Smithson*, Part V., p. 389, post.

(*k*) *Re Harrop*, 3 Drew. 726; *Re Wharton*, 5 De G. M. & G. 33.

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Money in Court.—Questions frequently arise as to the mode in which money in Court, impressed with the character of realty, can be laid out upon lands settled in the same manner as the money (a).

Mortmain.—See this note, *infra*, p. 340: and as to failure of trust to convert by operation of the statute, pp. 379, 381.

Rights of Heir.—Money agreed or directed to be laid out in the purchase of land acquires the descendible properties of land. Where the heir claims payment of the money from *strangers*, he will, it seems, in all cases be preferred to the personal representatives of his ancestor. Thus, where money has been *bequeathed* to be invested in land, for the use of the ancestor and his heirs; or where, on the marriage of the ancestor, money has been *actually paid*, either by him or by a stranger, to trustees, to be laid out in land, to be settled upon himself for his life, remainder to his wife for her life, with remainder to their issue, and in default of issue, to the ancestor and his heirs; or if, on the marriage of the ancestor, there be a *covenant* on the part of a stranger to lay out money in the purchase of land to be settled to the same uses, and in all these cases the ancestor die without issue—the heir of the ancestor, and not his personal representatives, will be entitled to the money to be laid out in the purchase of land (b).

If the heir seeks payment of the money from the *personal representatives* of the ancestor, his claims will be superior to those of the personal representatives, *if there be any prior outstanding equitable interest in the fund in another person*. Thus, where the ancestor has covenanted to lay out a sum of money in land, to be settled upon himself for life, remainder to his wife for her life, remainder to the issue of the marriage; remainder to his own right heirs: if, on the death of the ancestor, the wife or any issue be living, although they may afterwards die, the heir can call upon the personal representatives for the money (c). So where money was liable to be

(a) As to which see the Settled Estates Act, 1877, s. 34; Shelford, R. P. S. (1893), p. 656; Settled Land Act, 1882, s. 21, *Ib.* p. 688; Partition Act, 1868, s. 8, *Ib.* p. 742. See also *Re Lloyd*, 9 P. D. 65; *Re Harman*, (1894) 3 Ch. 601.

(b) *Scudamore v. S.*, Pr. Ch. 543; *Disher v. D.*, 1 P. W. 204; *Chaplin v. Horner*, 1 P. W. 487; *Edwards v.*

Warwick, 2 P. W. 171; *Knights v. Atkins*, 3 Vern. 20.

(c) *Kettleby v. Atwood*, 1 Vern. 298, 471; *Lancy v. Fairechild*, 2 Vern. 101; *Chaplin v. Horner*, 1 P. W. 483; *Lechinero v. Carlisle*, 3 P. W. 211; *Cas. t. Talbot*, 80; *Oldham v. Hughes*, 2 Atk. 452; *Wrightson v. Macaulay*, 4 Ha. 457.

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invested in land to be settled to uses in strict settlement, and all the uses were exhausted except a *legal jointure*, it was held by Jessel, M.R., that the jointress having an equity to compel the investment of the money in land, the same must be treated as real estate as between the real and personal representatives of the person who, subject to the jointure, was entitled thereto, though it seems it would be otherwise as to portioners (a).

But if there is no outstanding equitable interest, as where, in such a case as *Kettleby v. Atwood* (b), the wife dies in the lifetime of the ancestor, leaving no issue of the marriage, then, *as the obligation to lay out and the right to call for the money centre in the same person—viz., the ancestor—the covenant, without any act on his part, will be considered as discharged* the money to use a quaint expression, is "*at home*," and the heir will have no equity against the representatives of his ancestor. Thus, in *Chichester v. Bickerstaff* (c), it appears that, on the marriage of Sir John Chichester with the daughter of Sir Charles Bickerstaff, Sir Charles, by articles was to pay 1,500*l.* in part of the portion, which, *together with* 1,500*l.* more, *to be advanced by Sir John* within three years after the marriage, was to be invested in land and settled on Sir John for life, his intended wife for life, remainder to their issue, remainder to Sir John's right heirs. Within a year of the marriage the wife died, and Sir John three days after, without issue. Sir John by his will named Sir Charles *his executor*, and devised the residue of his personal estate, after debts, &c. paid, to Frances Chichester, his sister. The heiress-at-law of Sir John filed a bill against Sir Charles to compel him to pay the 1,500*l.* (*i.e.*, the 1,500*l.* to be advanced by Sir John), insisting that, by virtue of the marriage articles, the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir. But Lord *Somers* said: "This money, though once bound by the articles, yet when the wife died without issue became free again, and was under the power and disposal of Sir John as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to the creditor, and must have gone to the executor or administrators of Sir John; and this case is much stronger where there is a residuary legatee;" and dismissed the bill. Doubts have been thrown upon

(a) *Walrond v. Rosslyn*, 11 C. D. 640.

(b) 1 Vern. 298.

(c) 2 Vern. 295.

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this case by *Jekyll, M.R., in Lechmere v. Carlisle (a)*, and by Lord **Talbot** in *Lechmere v. L. (b)*; but in the great case of *Pulteney v. Darlington (c)*, Lord *Thurlow* expressed his opinion it was right. In that case money impressed with the qualities of realty had come to the hands of the person (Lord Bath) solely entitled to it under the ultimate limitation in fee, and the person so entitled, without taking any notice of the particular sum, devised all his manors, &c., which he was seised or possessed of, or to which he was in anywise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust moneys (except certain estates therein mentioned), to his brother H. in fee, and gave him all the residue of his personal estate, and made him executor. His brother H. subsequently, by his will, gave all his estates, by local descriptions, to certain uses therein mentioned, and all his money, securities for money, goods, chattels, and personal estate not before disposed of, to his executors for certain trusts mentioned in his will. *Thurlow, C.* dismissed the bill brought by the heir-at-law to have the money laid out in land. "If," said he, "A. B. has in his possession 20,000*l.* to be laid out in land for his use, he has nobody to sue, the right and the thing centering in one person, the action is extinguished;" and after citing and commenting upon the cases on this subject, his Lordship added, "The use I make of these cases, notwithstanding the dicta they contain, is this, that where a sum of money is in the hands of one without any other use but for himself, it will be money, and the heir cannot claim. . . . But whether that is clearly so or not, circumstances of demerit in the person (even though slight) will be sufficient to decide it—a very little would do, receiving it from the trustees, there is no doubt, would be sufficient. Lord Bath did receive it: he had it in his hands. Suppose he had it by way of covenant—otherwise, where would there be an end? If he kept it, subject to a covenant to lay it out for fifty years, should the heir come for it at the end of that term? It would lead to infinite inconveniences." This decision was affirmed on appeal to the House of Lords (*d*), and "went," as *Eldon, C.*, says, in *Wheldale v. Partridge (e)*, "no further than this, that if the property was *at home*, in the possession of the person under whom they claimed as heir and executor, the heir could not take it; but if it stood out in a third person he might; and the question in that cause was, not upon

(a) 3 P. W. 221.

(d) 7 Bro. Ch. 330.

(b) Cas. t. Talbot, 90.

(e) 8 V. 235.

(c) 1 Bro. Ch. 238.

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the equity between the heir and executor, but whether the money was at home" (a).

In *Walker v. Denne* (b), *Loughborough, C.*, observed, that, as between the heir and personal representative their rights were pure legal rights; that chance decided what should be real what personal, and that neither had a scintilla of equity to make the property that which it is not in fact; but this doctrine has been repeatedly dissented from in subsequent decisions (c).

Macclesfield, C., stated, "that if a party voluntarily and without any consideration covenants to lay out money in a purchase of land to be settled on him and his heirs, the Court would compel the execution of such contract, though merely voluntary, for in all cases where it is a measuring east betwixt an executor and an heir, the latter shall in equity have the preference" (d) the more correct principle appears to be that neither should be favoured and that right to the fund must depend upon the character with which it is impressed.

3. Conversion of Land into Money.

Land agreed or directed to be sold will be considered as money and as such will not pass under a devise of land (e), but will pass under a general residuary bequest of personal estate by the *cestui que trust* (f); and in case of intestacy, will go to his personal representatives (g), even where conversion is not to take place until after his death (h); and they may maintain an action, in the case of a contract to sell by a vendor against his heir-at-law and the purchaser for specific performance (i); and probate will be granted of the will

(a) *Chaplin v. Horner*, 1 P. W. 483; *Bowes v. Shrewsbury*, 5 Bro. P. C. 144; *Rich v. Whitfield*, 2 Eq. 583; *Chandler v. Pocock*, 16 C. D. 648.

(b) 2 V. jun. 175, 176.

(c) See *Wheldale v. Partridge*, 8 V. 235; *Lechmere v. L.*, Cas. t. Talbot, 90; *Thornton v. Hawley*, 10 V. 138; *Kirkman v. Miles*, 13 V. 338; *Stead v. Newdigate*, 2 Mer. 521; *Re Pedder's Settlement*, 5 De G. M. & G. 890.

(d) *Edwards v. Warwick*, 2 P. W. 176; *Lechmere v. L.*, Cas. t. Talbot, 90, 91; *Hayter v. Rod*, 1 P. W. 364; *Scudamore v. S.*, Pr. Ch. 544; *Crab-*

tree v. Bramble, 3 Atk. 689; *Wilson v. Reddard*, 12 Si. 32.

(e) *Elliott v. Fisher*, 12 Si. 505.

(f) *Stead v. Newdigate*, 2 Mer. 521; *Farrar v. Winterton*, 3 B. 1.

(g) *Ashby v. Palmer*, 1 Mer. 296; *Burton v. Hodsoll*, 2 Si. 24; *Biggs v. Andrews*, 5 Si. 424; *Elliott v. Fisher*, 12 Si. 505; *Griffith v. Ricketts*, 7 Ha. 299; *Hardey v. Hawkshaw*, 12 B. 552.

(h) *Clarke v. Franklin*, 4 Kay & J. 257.

(i) *Baden v. Pembroke*, 2 Vern. 38; *Hoddel v. Pugh*, 33 B. 489; *Fry, S. P.* (1892), p. 91.

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of a married woman who disposes of real estate which is converted in equity (*a*).

Aliens.—An alien, although he could not, previously to the Naturalization Act 1870 hold land as against the Crown, would, nevertheless, be entitled to the proceeds arising from the sale of land devised to trustees to sell for his benefit (*b*). Where however, there was no trust for absolute conversion, and the heir was an alien, the Crown was entitled to the estate (*c*). But now, by the Naturalization Act, 1870 33 & 34 Vict. c. 14 s. 2, which is not retrospective, aliens may hold or dispose of property of every description like British-born subjects (*d*). The Court will execute a trust of lands for an alien created prior to the Naturalization Act 1870, in favour of the Crown (*e*).

Felons.—Formerly, when a felon was entitled to money arising from the conversion of land, and a sale took place before he worked out his punishment, the Crown became entitled thereto (*f*). *Secus*, where he had worked out his punishment before the time of sale, as the Crown had no equity to compel conversion (*g*). But forfeiture for felony has been abolished (*h*), and the convict's property will be vested in administrators for the purposes mentioned in the Act (*i*).

Mortmain.—A bequest of money to arise from the sale of real estate, or a legacy from a fund to be produced by such a sale, was within the Mortmain Act (*k*), not because it came within its express words, but because it came within its meaning, inasmuch as if such a bequest were allowed the charity to whom the bequest was made might elect to take the land (*l*). And even when land has been directed to be converted into money by a former instrument, a bequest of the whole or part of the proceeds thereof by a party entitled thereto was void under the Mortmain Act (*m*); but see as to

(*a*) *In the Goods of Gunn*, 9 P. D. 242.

(*b*) *Du Hourmelin v. Sheldon*, 1 B. 79, affirmed on appeal by Lord *Cottonham*, 4 My. & C. 525.

(*c*) *Fourdrin v. Gowdey*, 3 My. & K. 383.

(*d*) *Sharp v. St. Sauveur*, 7 Ch. 343. See also 33 & 34 Vict. c. 102, and 35 & 36 Vict. c. 39.

(*e*) *Barrow v. Wadkin*, 24 B. 1; *Sharp v. St. Sauveur*, 7 Ch. 343.

(*f*) *Re Thompson's T.*, 22 B. 506.

(*g*) *Ib.*

(*h*) 33 & 34 Vict. c. 23.

(*i*) S. 10.

(*k*) 9 Geo. 2, c. 36.

(*l*) *A.-G. v. Weymouth*, Amb. 20; *Paico v. The Archbishop of Canterbury*, 14 V. 364; *A.-G. v. Harley*, 5 Madd. 321; *The Incorporated, &c., Society v. Coles*, 5 De G. M. & G. 331; *Robinson v. R.*, 19 B. 201.

(*m*) *A.-G. v. Harley*, 5 Madd. 321; *Brook v. Badley*, 4 Eq. 106, 3 Ch. 672; *Re Watts*, 29 C. D.

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testator dying after 5th August, 1891, The Mortmain and Charitable Uses Act (54 & 55 Vict. c. 73); and see further pp. 379, 381, *infra*.

Locke King's Act.—A share of the proceeds of freeholds settled, by deed, on trust for conversion, is not an interest in land within the Act and therefore a mortgage charged on the freehold must be paid out of the residuary estate. And, *semble*, that where an interest in land is given by the testator with the option of retaining it in specie or of having it converted; then if it is taken without conversion it must bear the burthen of the charge (*a*).

4. When Conversion takes place.

By Contract.—The question between the real and personal representatives is, whether the vendor at the time of his death was either absolutely or contingently under such an agreement as equity would enforce against him (*b*). Where there is no specific performance of a contract possible there is no conversion (*c*). Where the property, however, has, either by operation of law or of contract, been converted, there is no equity between the legal and personal representatives, or between legal devisees and personal legatees (*d*).

A mere notice to treat given by a railway company, or other persons having compulsory powers to purchase lands, to an owner of land in fee (being *sui juris*), although it may so far constitute an obligation as to enable the company to restrain the landowner from putting up the property for sale by auction (*e*), will not operate as a conversion of the land into personality (*f*) although the landowner

947; *Lucas v. Jones*, 4 Eq. 73; *Shalbolt v. Thornton*, 17 Si. 49, 13 Jur. 597; *Ashworth v. Munn*, 15 C. D. 363; and as to apportionment, see *Re Hill's T.*, 16 C. D. 173. See now the Mortmain and Charitable Uses Acts, 1888, 1891, 1892. By the Act of 1891 (54 & 55 Vict. c. 73), it is provided that, with respect to the wills of testators dying after 5th Aug. 1891, land assured by will to a charitable use is to be sold, and the proceeds given to the charity, and that personal estate directed to be laid out in land for a charitable use shall go to the charitable use as if there had been no

such direction.

(*a*) *Lewis v. L.*, 13 Eq. 218.

(*b*) See *Dart* (1888), p. 295; *Lysaght v. Edwards*, 2 C. D. p. 506; *Jarman, Wills* (1893), p. 52. But subject to *Locke King's Act*, *Re Cockerost*, 24 C. D. 94, ante, p. 32.

(*c*) *Edwards v. West*, 7 C. D. 858; *Thomas v. Howell*, 34 C. D. 166.

(*d*) *Frewen v. F.*, 10 Ch. 610.

(*e*) *The Metropolitan R. Co. v. Woodhouse*, 13 W. R. 516.

(*f*) *Haynes v. H.*, 1 Dr. & Sm. 426; but see *Walker v. The Eastern Counties R. Co.*, 6 Ha. 594.

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state the price he is willing to accept, if he die before the acceptance of his offer (*a*). Nor will conversion take place where the contract with the landowner merely fixes the price per acre, without mentioning the quantity to be taken, and the purchase-money paid for the land taken after the owner's death will be realty (*b*).

But where a notice to take lands by a company under their compulsory powers is followed up by the company and landowner fixing upon the price, the contract is complete, and conversion will take place (*c*), and the result is the same where the price is ascertained either by arbitration (*d*), by the valuation of two surveyors (*e*), or the verdict of a jury (*f*). So where A. devises an estate to B. and contracts to sell it, but dies before completion, the devise to B. will be adimpled, B. will take only the legal estate, and the purchase-money will form part of the testator's personal estate from the time fixed for completion (*g*). But until completion the devisee or heir would be entitled to the rents (*h*). Where an heir adopted a parol contract of his ancestor to sell land it was held to have been converted, and the proceeds to belong to the personal representatives of the ancestor (*i*).

When a person who has entered into a binding contract for the purchase of land in fee dies before the contract is completed, his devisee or heir-at-law becomes entitled to the land, and before the 30 & 31 Viet. c. 69, and the 40 & 41 Viet. c. 34 (*k*), could compel payment of the purchase-money out of the personal estate (*l*), and the rights of the purchasers, his real representatives, will not be affected by anything which takes place subsequently. Thus, if the contract ceased to be binding on the purchaser's representatives in

(*a*) *Re Battersea Park Acts, Re Arnold*, 32 B. 591; *Richmond v. North London R. C.*, 5 Eq. 352, 358.

(*b*) *Ex p. Walker*, Drew. 308.

(*c*) *Ex p. Hawkins*, 13 Si. 569; *Watts v. W.*, 17 Eq. 217; *Re The Manchester, &c., R. C.*, 19 B. 365; *The Regent's Canal Co. v. Ware*, 23 B. 575; *Nash v. The Worcester, &c., Commissioners*, 1 Jur. (N. S.) 973; *Adams v. London, &c., R. C.*, 2 Mac. & G. 118; *Re Pigott*, 18 C. D. 146, 150.

(*d*) *Harding v. Metropolitan R. Co.*, 7 Ch. 154.

(*e*) *Watts v. W.*, 17 Eq. 217.

(*f*) *Haynes v. H.*, 1 Dr. & Sm. 426.

(*g*) *Watts v. W.*, 17 Eq. 217; *Re Manchester, &c., R. C.*, 19 B. 365.

(*h*) *Watts v. W.*, *supra*; *Townley v. Bedwell*, 14 V. 591; and see further *Lawes v. Bennett*, 1 Cox, 167, *infra*, p. 353; *Knollys v. Shepherd*, 1 J. & W. 499; *Edwards v. West*, 7 C. D. 858; *Re Adams, &c.*, 27 C. D. 394.

(*i*) *Frayne v. Taylor*, 33 L. J. Ch. (N. S.) 228. Cf. *Parry v. Spencer*, 36 L. T. R. 159.

(*k*) *Ante*, pp. 29 and 31.

(*l*) *Garnett v. Acton*, 28 B. 333; *Langford v. Pitt*, 2 P. W. 629, 632; *Broome v. Monck*, 10 V. 597, 612, 615.

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consequence of the selling of ornamental timber by the vendor (a), or was rescinded by the vendor on the ground of delay or defects in title (b), or under a power reserved to him in the contract (c), the real representative of the purchaser is entitled to the purchase-money (d).

Where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held by *Ross v. Wetherill*, M.R., that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate (e).

As to a contract with an option to purchase, see *infra*, p. 352.

Conveyancing Act, 1881.—Formerly the devisee or heir-at-law of the person who had contracted for the sale of land, on his death, was obliged to join in the conveyance. Now, however, under the 4th section of the above Act, which commences from and after the 31st of December, 1881, it is enacted:

S. 4: "(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land, for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

"(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

"(3.) This section applies only in cases of death after the commencement of this Act."

Direction to Convert must be Imperative.—The direction to convert either money into land or land into money must be express, and imperative; for if conversion be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found. Thus, where A. gave 500*l.* to B., in trust that B. should lay out the same upon *a purchase of lands or put the same out on good securities*, for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors, and administrators, and died in 1729. In 1731, H., the daughter, died without issue before

(a) Dart (1838), 6th ed.

(d) See also *Curro v. Bowyer*, 5 B. 6.

(b) *Whittaker v. W.*, 4 Bro. Ch. 31;

n.: *Ayles v. Cox*, 16 B. 23.

Thomas v. Howell, 55 L. T. R. 629.

(c) *Cooper v. Jarman*, 3 Eq. 98.

(e) *Hudson v. Cook*, 13 Eq. 417.

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the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H., and the money was decreed to the administrator; for, the wife not having signified any intention of a preference, the Court would take it as it was found, if the wife had signified any intention, it should have been observed, but it was not reasonable at that time to give either her heir or administrator, or the trustee, liberty to elect; for Lord *Talbot* said, it was originally personal estate, and yet remained so, and nothing could be collected from the will as to what was the testator's principal intention (*a*). So, if money is directed to be laid out "in Government or other securities or in the purchase of freeholds" or "to remain at interest, or be laid out in land," or "to be laid out in freeholds or leaseholds," or if similar expressions are made use of, leaving the nature of the investment *optional*, or which do not sufficiently indicate an intention that the money should be laid out in land at all events, no conversion will take place until the trustees have actually exercised their discretion, which, when clearly given to them, the Court will not control (*b*). So where such is clearly the intention of the testator, the destination of the property, even under the will itself, may depend upon the exercise by trustees of their option to sell (*c*).

The vesting also of property may be made, by clear and unequivocal terms, to depend upon the time when the option to sell is exercised (*d*). But if there is a *trust for sale*, the non sale will not prevent the property vesting (*e*).

A mere power to trustees of residuary real estates given together with residuary personality to executors upon trust, will not have the effect of converting the real estate, even though it be accompanied by a declaration that the testator's residuary estate shall for the purpose of transmission be impressed with the quality of personal estate from the time of his decease (*f*). So where trustees have a mere power with the *consent* of a person in possession of certain settled estates

(*a*) *Curling v. May*, 3 Atk. 255; *Re Ibbitson*, 7 Eq. 226.

(*b*) *Walter v. Maunde*, 19 V. 424; *Van v. Barnett*, 19 V. 102; *Walker v. Denne*, 2 V. jun. 170; *Wheldale v. Partridge*, 5 V. 388, 7 R. R. 37; *Atwell v. A.*, 13 Eq. 23; *Re Whitty's T.*, 9 Ir. Eq. 41; *Lucas v. Jones*, 4 Eq. 77; *Re Gordon*, 6 C. D. 537.

(*c*) *Polloy v. Seymour*, 2 Y. & C.

708; *Brown v. Bigg*, 7 V. 279; *Harding v. Trotter*, 21 L. T. 279; *Yates v. Y.*, 26 B. 637; *Re Sinclair*, 56 L. T. 83; cf. *Re Ocock*, 40 Sol. Jo. 210.

(*d*) *Elwin v. E.*, 8 V. 547; *Faulkener v. Hollingsworth*, *ib.* 558.

(*e*) *Minor v. Battison*, 1 App. Cas. 746.

(*f*) *Hyett v. Mekin*, 25 C. D. 735.

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to lay out personal property in land to be settled to the same uses no absolute conversion takes place (a). But the context may show that the power is in the nature of a trust, and that conversion is imperative (b).

Although conversion is apparently optional, as where trustees are directed to lay out personalty, "either in the purchase of lands or inheritance, or at interest," "in freeholds, leaseholds, or copyholds" or "in land or some other securities," as they shall think most fit and proper; yet if the limitations are adapted only to real estates, so as to manifest the testator's intention that land should be ultimately purchased, the money must be considered as land, although it be not actually so invested by trustees (c). In *Fletcher v. Ashburner* (d), W. P. devised lands to trustees, to the use of his wife for life, remainder to his first and other sons in tail, remainder to others in fee, as tenants in common. And he directed that 400*l.* should be raised by his executrix out of his personal estate, and paid by her to his trustees or one of them, who should lay out the same *in the purchase of lands or any other security or securities, as they should think proper and convenient*, and he directed that the lands so to be purchased, and the security or securities on which the 400*l.* should be so laid out, should be made to and settled on the trustees, their heirs and assigns, **in trust and to the use of his wife for life, and after her decease to such uses, and under such provisions, conditions, and limitations, as his lands before devised were limited.** Lord *Hardwicke* held, that **conversion was not at the election of the trustees.** "This Court," he said, "never admits trustees to have such election, to change the right, unless it is expressly given to them. Here the money is to be laid out in land or securities, for such uses as the land is before settled. If it is laid out in securities (which are personal), all the limitations might not take place; for if there was a son born, he would take the whole money, as being tenant in tail, and the subsequent limitations would be defeated. The only way to make the clause consistent is that the money be laid out on securities and lands are purchased, and the interest and dividends, in the meantime, to go to such persons as would be entitled to the land" (e).

(a) *De Beauvoir v. De B.*, 3 H. L. Cas. 524; *Lucas v. Brandroth*, 25 B. 273; *Edwards v. Tuck*, 23 B. 268; *Re Bird*, (1892) 1 Ch. 279.

(b) *Grieveson v. Kirsopp*, 2 Keen, 653; and cases *infra*, p. 348.

(c) *Cowley v. Hartstonge*, 1 Dow,

361; *Hereford v. Ravenhill*, 5 B. 51; *Cookson v. Reay*, 5 B. 22, 12 Cl. & Fin. 120; *Johnson v. Arnold*, 1 V. 169; *Simpson v. Ashworth*, 6 B. 412; *Ralph v. Carrick*, 5 C. D. 984, 11 C. D. 873.

(d) *Amb.* 241.

(e) See also *Edwards v. Warwick*,

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When there is a direction that money should be laid out in the purchase of land, a mere temporary provision, that in the meantime and until such purchase could be found, the money is to be placed out on securities, will not prevent immediate conversion from taking place (*a*). If, however, it appeared to be the intention that in a particular event, as, for instance, the death of a husband before his wife, the investment in securities was not to be of a merely temporary but of a final character, conversion will not take place (*b*).

When there is a trust to sell within a particular time, it will be considered merely as directory, and conversion will take place, although no sale takes place within the time mentioned (*c*). So also when lands are directed to be sold, although the sale is to take place as soon as the trustees should see necessary for the benefit of the *cestui que trusts* (*d*).

Conversion in favour of a particular legatee, to whom the proceeds of sale are bequeathed, will not be prevented by a devise of the property in an alternative event, in terms applicable to its unconverted state, inasmuch as the testator may have contemplated the possibility of the event taking place before a sale; moreover, it may have been intended that as to one legatee, the property might be real, and as to the other legatee, to whom it was given on an alternative event, personalty (*e*). But a trust for conversion will not be prevented from being imperative in both alternatives, because it is less necessary for distribution in one event than the other (*f*).

Said at Request or with Consent.—Where conversion is to take place at the request of certain persons, if the words of request are merely inserted for the purpose of enforcing the obligation to convert, although a conversion has taken place without consent, it will be considered to have been properly made. Thus, where the limitations are only adapted to real estate, a direction to lay out money after

2 P. W. 171; *Thornton v. Hawley*, 10 V. 138, *infra*, p. 347; *Johnson v. Arnold*, 1 V. 169; *Hereford v. Ravenhill*, 5 B. 51; *Cookson v. Roay*, 5 B. 22, 12 Cl. & Fin. 121; but see *Atwell v. A.*, 13 Eq. 23; *Evans v. Bull*, 30 W. R. 1889.

(*a*) *Edwards v. Warwick*, 2 P. W. 171.

(*b*) *Wheldale v. Partridge*, 5 V. 358, 8 V. 227.

(*c*) *Pearce v. Gardner*, 10 Ha. 287;

Cuff v. Hall, 1 Jur. (N. S.) 972; *Tily v. Smith*, 1 Coll. 431.

(*d*) *Doughty v. Bull*, 2 P. W. 320; see also *Robinson v. R.*, 19 B. 494; *Re Raw*, 26 C. D. 601; *Re Heathcote*, 56 L. T. 43.

(*e*) *Ashby v. Palmer*, 1 Mor. 296; *Cowley v. Hartstonge*, 1 Dow. 381; *Ward v. Arch*, 15 Si. 389.

(*f*) *Wall v. Colshead*, 2 De G. & J. 683; *Wilson v. Coles*, 6 Jur. (N. S.) 1003; *Crabtree v. Bramble*, 3 Atk. 680.

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the request of persons, in the purchase of lands, will be construed as imperative, although no request may have been made, and there is a declaration, that *until* the purchase should be made, the money should be placed out on securities, and a disposition of the dividends and interest in the meantime, to the same persons to whom the rents and profits of the estates to be purchased would go. In fact "nothing is more common than to direct money to be laid out upon request. The object of that is, only to ensure that the act shall be done when the request is made—not to prevent it until request" (a). So where real property was vested in trustees upon trust *at the request* of A. and B. and the survivor, and after their deaths *at discretion*, to sell and hold the proceeds upon trust for A. and B. successively for life, and then for the children equally. It was held after the deaths of A. and B. when there were three adult children living, that the trust for sale was not spent, the children not having elected to require a conveyance of the land, and that it could be exercised by the trustees without the concurrence of the beneficiaries (b). But where words requiring the request or consent of parties to a sale are inserted for the purpose of giving a *discretion to them*, if the sale takes place without their request or consent the proceeds of the sale will still be considered as land. Thus, where the sale was to be "with the joint consent and approbation of the husband and wife, and *not without*;" conversion, therefore, in that case, was held to be not imperative, but at the option of the husband and wife (c). A person, however, whose consent or approbation to a sale is required, will not be allowed to delay it to another person's prejudice and to his own advantage (d).

Discretionary Power of Sale or Trust for Sale.—Where there is a mere discretionary power to convert real property into personalty, and to distribute it amongst certain persons, such persons must take the property in the actual condition in which they find it (e). The discretionary power of sale may be in form a

(a) See *Thornton v. Hawley*, 10 V. 129; *Triquet v. Thornton*, 13 V. 345; *Van v. Barnett*, 19 V. 102; *Symons v. Rutter*, 2 Vern. 227, approved in *Pulteney v. Darlington*, 1 Bro. Ch. 238; *Lechinero v. Carlisle*, 3 P. W. 219; *Costello v. O'Rourke*, 3 Ir. R. Eq. 172; *Wrightson v. Macaulay*, 4 Ha. 487; *Batteste v. Maunsell*, 10 Ir. R. Eq. 97, 314; *A.-G. v. Dodd*, (1894) 2 Q. B. 150; but see *Stead v.*

Newdigate, 2 Mer. 530.

(b) *Re Twoedie*, 27 C. D. 315; *Biggs v. Peacock*, 22 C. D. 284; *A.-G. v. Dodd*, (1894) 2 Q. B. 150.

(c) *Davies v. Goodhew*, 6 Si. 585; *Re Taylor's Settlement*, 9 Ha. 596; *Huskinson v. Lefevre*, 26 B. 157; *Sykes v. Shoard*, 33 B. 114.

(d) *Lord v. Wightwick*, 1 De G. M. & G. 803; 6 H. L. Cas. 217.

(e) *Walter v. Maunde*, 19 V. 424;

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trust, as in *Re Hotchleys* (a), and the discretion of the trustees will not be interfered with by the Court (b).

The result will be different where the power is imperative, and in the nature of a trust. Thus, in *Girvinson v. Kirkopp* (c), where a testator gave to his widow, "for the benefit and advantage of his children," power of selling his W. estate, and by a codicil, he expressed himself in effect thus, "I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she my said wife shall and may divide and proportion among my said children, as she shall think fit and proper, or as she shall direct by will." The widow died without having sold or appointed the estate. *Langdale*, M.R., held that the power was in the nature of a trust for the children, and that, subject to such appointment as the widow might have made, the children were entitled in equal shares; and that the direction to sell, expressed as it was, operated as a conversion of the real estate, and that the children were entitled to take the money to arise from the sale as personally (d), and in such a case the Court would enforce the trust (e).

Implied Conversion.—The conversion of land into money may be implied without any express words directing a sale (f), where the property, consisting of real and personal estate, was divided into shares, with directions as to the investment of some of such shares, and the realty was held to be converted. But in order to effect such conversion the intention must be clear (g).

Double Conversion.—A double conversion may be directed leaving the notional character of the land unchanged. Thus, when land is directed to be sold and the proceeds invested in the purchase of land, it will be regarded as real estate though no sale has actually

Rich v. Whitfield, 2 Eq. 583; *Polley v. Seymour*, 2 Y. & C. 708; *Cowley v. Hartstonge*, 1 Dow. 378; *Bourne v. B.*, 2 Ha. 35; *Edwards v. Tuck*, 23 B. 268; *Lucas v. Brandreth*, 28 B. 273; *Yates v. Y.*, 28 B. 637; *Re Beaumont's T.*, 32 B. 191; *Re Ibbitson's E.*, 7 Eq. 226; *Miller v. M.*, 13 Eq. 263; *Atwell v. A.*, 13 Eq. 23.

(a) 32 C. D. 408, 416. See also *Robinson v. R.*, 19 B. 404; *Biggs v. Peacock*, 22 C. D. 284; *Re Raw*, 26 C. D. 601.

(b) *Re Courtier*, 34 C. D. 136; *Re Ocock*, 40 Sol. Jo. 210.

(c) 2 Keen, 653.

(d) See also *Burroll v. Baskerfield*, 11 B. 325; *Nickisson v. Cockill*, 3 De G. J. & S. 622; *Re Heathcote*, 58 L. T. 43.

(e) *Re Courtier*, supra.

(f) *Mower v. Orr*, 7 Ha. 475.

(g) *Cornick v. Pearce*, *ib.* 477; *Greenway v. G.*, 1 Gif. 131; 2 De G. F. & J. 128; *Affleck v. James*, 17 Si. 121; *Murton v. Markby*, 18 B. 196; *Lucas v. Brandreth*, 28 B. 273; *Tait v. Lathbury*, 1 Eq. 174; *Re Garnett*, 25 C. D. 595; *Re Holloway*, 60 L. T. 46.

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taken place (*a*). And if part of such land be sold, and the money not yet reinvested, the money will not pass under a devise of all the testator's interest in the land, if there is any part of the land unsold which would answer the description (*b*).

5. Conversion for Fiscal Purposes.

In determining the incidence of these duties, the Court is now guided not by the legal nature of the property but by the character impressed upon it by the equitable doctrine of conversion (*c*). For all purposes, therefore, land converted into money is to be treated as money either for the purposes of a settlement or for fiscal purposes; because equity, and now law, following equity regards the land as money (*d*). Under the General Stamp Act (*e*), "money to arise from the sale, mortgage, or other disposition, of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of," is liable to the payment of legacy duty. But the question arises, whether the direction for conversion is absolute and imperative, or merely optional; for in the former case, the real estate is liable to the payment of legacy duty, even though it be not sold, in consequence of the person absolutely entitled electing to take it, instead of the proceeds to arise from a sale (*f*). If, however, the sale is optional and discretionary (*g*), and the land is left unsold by the trustees in the exercise of such discretion, the legacy duty will not attach: even although there be a declaration in the will that the land is to be considered personalty. *Seems*, if the trustees, in the exercise of such discretion sell (*h*). However, it seems doubtful whether the liability to the duty should depend upon any act of the trustees (*i*).

Where there is a power to sell, and a sale takes place, if it is

(*a*) *Sperling v. Toll*, 1 V. 70; *Pearson v. Lane*, 17 V. 101.

(*b*) *Re Polder's Settlement*, 5 De G. M. & G. 890; *Re Bird*, (1892) 1 Ch. 279; cf. *Re Cleveland's S. E.*, (1893) 3 Ch. 244.

(*c*) *Forbes v. Stoven*, 10 Eq. 178; *A.-G. v. Ailesbury*, 12 App. Cas. 672.

(*d*) *A.-G. v. Dodd*, (1894) 2 Q. B. 150; and *Matson v. Swift*, 8 B. 368; and *Re De Lancey*, 5 Exch. 102, may be considered as overruled.

(*e*) 55 Geo. 3, c. 181, Sched. part 3.

(*f*) *A.-G. v. Holford*, 1 Price, 426; *Adv.-Gen. v. Ramsay's T.*, 2 Cr. M. &

R. 224, n.; *Williamson v. The Adv.-Gen.*, 10 Cl. & Fin. 1; *Jessop v. Watson*, 1 My. & K. 665; *A.-G. v. Ailesbury*, 12 App. Cas. 672; *Re Richerson*, (1892) 1 Ch. 379.

(*g*) See *A.-G. v. Dodd*, *supra*, and cases there cited.

(*h*) *A.-G. v. Mangles*, 3 M. & W. 120; *A.-G. v. Simeon*, 1 Ex. R. 719.

(*i*) *Re Evans*, 2 Cr. M. & R. 200; *Adv.-Gen. v. Smith*, 10 Cl. & Fin. 14. See now the Succession Duty Act (16 & 17 Vict. c. 51), s. 29; 51 Vict. c. 8; The Finance Act, 1894, s. 18.

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effected, not under the power, but under the jurisdiction of the Court, legacy duty will not be payable (a).

And where powers of sale are given to trustees for variation of securities (b), for raising monies for payment of debts, legacies, or other prior charges (c), for investment of the proceeds "in the purchase or on mortgage" of other lands (d), and *à fortiori*, where they are simply directed to invest the proceeds in the purchase of real estate (e), the legacy duty will not attach although a sale may have taken place, and the person beneficially entitled has elected to take the money, for "the Crown has no claim except where the money is handed over to a party *by force of the will of the testator*" (f).

As to legacy duty on money directed to be laid out in purchase of land, see (g).

Probate duty attaches to whatever the personal representative is entitled to *virtute officii*, whatever may be the particular source from which it comes, or whatever may be the form, position, or condition of the property at the death of the testator (h). Realty converted into personalty, but to be again changed to realty, is not property of such a nature (i).

But where land directed to be absolutely converted into money results to the heir-at-law in consequence of a failure of some of the trusts as personalty, although there may have been no actual conversion, it will as personalty be liable to probate and legacy duty upon the death of the heir-at-law (k), and where a testator enters into a binding contract to sell land, and dies without receiving all the purchase-money, such part of it as is received by his executors is liable to probate duty, because it was received by them as part of the testator's personal estate (l).

And where a testator disposes of freehold property, absolutely converted into personalty by a former settlement it will be considered as personalty, and be liable to probate and legacy duty, and the

(a) *Hobson v. Neale*, 17 B. 178; *Harding v. H.*, 2 Gif. 597.

(b) *Mules v. Jennings*, 8 Exch. 830.

(c) *Adv.-Gen. v. Smith*, 1 Macq. II. L. Cas. 760.

(d) *Mules v. Jennings*, 8 Exch. 830.

(e) *Heal v. Knight*, 8 Exch. 839, n.

(f) Per *Alderson, B.*, in *Mules v. Jennings*, *supra*; *Re Goodall*, (1895) 13 R. 870, option to purchase lease.

(g) 36 Geo. 3, c. 52, s. 19; Do

Lancey v. The Queen, 7 Ex. 140;

Macfarlane v. Lord Advocate, (1894)

A. C. 291; *Kenlis v. Hodgson*, (1895)

2 Ch. 458.

(h) *A.-G. v. Brunning*, 8 H. L. Cas. 243; *Forbes v. Steven*, 10 Eq. 178.

(i) *Re Lloyd*, 9 P. D. 65.

(k) *A.-G. v. Lomas*, 9 Ex. 29; *Re Richerson*, (1892) 1 Ch. 379.

(l) *A.-G. v. Brunning*, 8 H. L. Cas. 243; see *Re Goodall*, *supra*.

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will disposing thereof will be entitled to probate (*a*). And the result would be the same where the conversion arises from the directions in the will alone (*b*).

Legacy and probate duty is payable on real estate not only converted into personalty in equity in consequence of its having been purchased with partnership capital and used for partnership purposes in trade (*c*). Money of a lunatic land out in land by an order containing a declaration that the property was to be considered as personalty, is liable to this duty although it is realty at the lunatic's death, and the persons beneficially interested elect to take it as land (*d*).

Stamp Act (13 & 14 Vict. c. 97).—A settlement of land held on trusts for absolute conversion, although purchased for a particular sum, is not under this Act (see schedule Settlement, and *W. Stamp Act, 1891*), subject to an *ad valorem* duty as "a definite and certain principal sum of money" (*e*).

6. Of the Period from which Conversion Commences.

Where absolute conversion is directed to be made by *deed*, at no time for it be pointed out, it will take place from the delivery of the deed (*f*).

In the case of a *will* it will take place from the death of testator (*g*), although there may be a direction that a sale should take place "whenever it should appear advantageous (*h*)"; unless it be directed to take place at another time, as, for instance, upon the death of a person entitled for life independently of the will (*i*).

Rents until Conversion.—Until conversion actually takes place the person to whom the interest of the proceeds of the estate directed to be sold is given, will be entitled, in lieu thereof, to the rents of the estate. Thus, if an estate be devised to trustees upon trust for sale after the testator's death, or after the death of A, and to pay the interest of the proceeds to B, for life, B will be entitled

(*a*) *Re Gunn*, 9 P. D. 242.

(*b*) *A.-G. v. Lomas*, 9 Exch. 29; *Re Richerson*, (1892) 1 Ch. 379.

(*c*) *Forbes v. Stevon*, 10 Eq. 178; *Stokes v. Ducroz*, 62 L. T. 176; *A.-G. v. Hubbuck*, 13 Q. B. D. 275; *A.-G. v. Ailesbury*, p. 684.

(*d*) *A.-G. v. Ailesbury*, 12 App. Cas. 672.

(*e*) *Re Stucley's Sett.*, 5 Ex. 85; but *quære*, and see *A.-G. v. Dodd*, (1894) 2

Q. B. 150.

(*f*) *Griffiths v. Ricketts*, 7 Ha. 299; *Clarke v. Frankling*, 4 Kay & J. 257.

(*g*) *Beauleck v. Mead*, 2 Atk. 167; see *Ward v. Arch*, 15 Si. 389; *Hutchins v. Mannington*, 1 V. jun. 336.

(*h*) *Robinson v. R.*, 19 B. 495; *Re Raw*, 26 C. D. 601.

(*i*) *Fitzgerald v. Jervoise*, 5 Madd. 25.

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to the rents of this estate in the first instance from the death of the testator; in the second from the death of A. until the sale of the estate takes place (a).

When lands are directed to be sold and the proceeds to be invested in the purchase of other lands to be settled to the use of a person for life without impeachment of waste, although there is a direction that the rents and profits of the lands till sold are to be to the use of the same persons who would be entitled to the lands to be purchased, the tenant for life cannot cut timber on the estate to be sold, because if he were allowed to do so on that estate as well as on that to be bought, he would have double waste (b).

Conversion dependent upon an Option.—Mortgages.—Where a mortgage of freehold estate contains a power of sale, with a direction that the surplus moneys to arise from the sale shall be paid to the mortgagor, his heirs, executors, administrators, or assigns, if the estate be sold in the lifetime of the mortgagor, the surplus moneys will be the personal estate of the mortgagor; but if the estate be unsold at the death of the mortgagor, the equity of redemption devolves upon his heir or devisee; if a sale subsequently takes place, the heir or devisee, as the case may be, will be entitled to the surplus produce. Thus, in *Bonnie v. B.* (c) real estate was conveyed to a trustee, on trust to permit the mortgagor to receive the rents and profits, and upon payment of the principal and interest of the mortgage debt as therein mentioned, to reconvey the estate to the mortgagor, his heirs and assigns; but if default should be made in such payment, then that the trustee should enter into possession of the premises, and *et hoc deservit* sell the same, and pay over the residue or surplus (after payment of the debt interest, and costs) to the mortgagor, his heirs, executors, administrators, or assigns. There was default in payment, but no sale of the estate took place until after the death of the mortgagor, who devised it to the plaintiffs for life, with remainder over in tail. *Wigram, V.-C.*, held that there was no conversion, but that the surplus proceeds passed by the devise as real estate. "It," said his Honour, "the trustee had taken the property with absolute directions to sell and convert it, the circumstance, that the directions had not been carried into effect at the death of the testator might have been

(a) *Pearson v. Lane*, 17 V. 101;
Casamajor v. Strobe, 19 V. 390, n.;
Fitzgerald v. Jervoise, 5 Madd. 25,
 where the marginal note is inaccurate;

Miller v. M., 13 Eq. 263.

(b) *Plymouth v. Archer*, 1 Bro. Ch.
 159; *Burges v. Lamb*, 16 V. 180.

(c) 2 Ha. 35.

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immaterial, and it might have been treated as personality. But in this case there was no absolute or compulsory direction for the sale or conversion of the estate; it is merely an authority, in a certain event, to enter into possession of this estate, and at the discretion of the trustee to sell it, for the purpose of recovering payment of the debt for the mortgagee. The direction to reconvey the estate, in case of payment of the mortgage-money, is inconsistent with the notion that there was any intention that the property should be absolutely converted by the effect of the conveyance. The event upon the happening of which the trustee might at his discretion have sold the estate—namely, the default in payment of the mortgage-money—took place in the lifetime of the testator; but the discretion to sell had not been exercised at the time of his death. The consequence is, that the estate passed to his devisees as realty, subject to the mortgage, and the trustee must therefore account to the devisees for the surplus proceeds of the sale" (a). See and consider *Re Underwood* (b), where the conveyance was upon trust to sell on default, and the conveyance was to be considered an absolute conveyance and not a mortgage, and *Jones v. Davies* (c), where, there being an inconsistency between the reservation of the equity of redemption and the trust of the surplus sale moneys, effect was given under the circumstances to the latter.

Option to Purchase.—Conversion may be made to depend upon the option to purchase upon a future time. Thus, in *Laves v. Bennett* (d), Witterwonge, in 1758, demised a farm to Douglas, his executors, administrators, and assigns for seven years, and there was an agreement endorsed upon the lease, that if Douglas should, before the 29th of September, 1765, give notice in writing of his wish to purchase the inheritance of the premises for 3,000*l.* Witterwonge agreed to sell and to execute to him a proper conveyance thereof. Witterwonge died in 1763, leaving by his will devise all his real estates to the defendant Bennett, and all his personal estate to the defendant Bennett, and to the plaintiff Mary, the sister of the defendant Bennett, equally. In 1762 Douglas assigned the lease and the benefit of the agreement to Waller, and on the 2nd of February, 1765, Waller called upon Bennett to perform the contract entered into by Witterwonge, and he, Bennett,

(a) See also *Wright v. Rose*, 2 S. & S. 323; *Clarke v. Franklin*, 4 Kay & J. 260; *Re Cooper's T.*, 4 Do G. M. & G. 768.

(b) 3 Kay & J. 745.

(c) 8 C. D. 205.

(d) 1 Cox, 167, 1 R. R. 10. See *Re Adams*, 27 C. D. 394.

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accordingly executed a conveyance to Waller in fee. Bennett having died, a bill was filed by Lawes, the husband of Bennett's sister, against the personal representative of Bennett, claiming a moiety of the 3,000*l.* and interest, and *Keagou*, M.R., so decreed, saying: "It is very clear, that if a man seised of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. * * * When the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period" (a). In *Re Isaacs* (b), I. demised certain premises of which he was owner in fee to C. for the life of the lessor, with an option to purchase within six months after his decease. I. died *intestate*, and C. gave notice to the administrator and heir-at-law of I. that he intended to exercise the option. *Chitty*, J., held the principle of *Lawes v. Bennett* (c) applied, and the purchase-money went to the personal representative.

But the principle of *Lawes v. Bennett* is not to be extended, and it has, therefore, been held to apply only between the real and personal representatives of the vendor, and not as between vendor and purchaser. Thus, in *Edwards v. West* (d), a landlord covenanted to insure for 14,000*l.*, and the tenant had the option at a fixed time to purchase for 15,200*l.* There was no stipulation whatever (except in a contingency which did not happen) with regard to the insurance moneys. Before the time for exercising the option the buildings demised were burnt, and the landlord received from the insurance offices nearly 12,000*l.* for the damage done. The tenant then exercised his option to purchase, and claimed the insurance money as part of his purchase, on the ground that the option to purchase when exercised related back to the time of the contract giving the option, since which it was argued the property had been partially converted into personalty by the fire and the receipt of the insurance money, and that the purchaser was entitled to it in that shape. *Fry*, J., being of opinion that conversion according to general principles, cannot relate back to an earlier date than that of the contract constituted by the exercise of the option,

(a) See also *Townley v. Bedwell*, 14 V. 596, 9 R. B. 352; *Weeding v. W.*, 1 John. & H. 424; *Collingwood v. Row*, 26 L. J. Ch. 649; *Woods v. Hyde*, 10 W. R. 339.

(b) (1894) 3 Ch. 506.

(c) 1 Cox, 167, 1 R. B. 10.

(d) 7 C. D. 858; cf. *Re Adams, &c.*, 27 C. D. 394; *Re Goodall*, (1895) 13 R. 870.

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said, that although he should follow *Lawes v. Bennett* in a case between real and personal representatives of the person who granted the option, nevertheless, as that case, according to the language of Lord Eldon, in *Towary v. Bodwell* (b), and of Keble, V.C. in *Collingwood v. Row* (c), was not consistent with the general principles applicable to cases of conversion he did not think that he was at liberty to extend the doctrine, so as to apply that there was a conversion from the date of the contract giving the option *as between vendor and purchaser*, and he held the purchaser had no claim to the insurance money.

And, moreover, where the giver of the option dies *testate*, there may be such an indication of intention in the testator's will as to take the case out of the rule in *Lawes v. Bennett* (d). Thus, in *Re Pyle* (e), a testator, by his will in 1886, devised certain real estate specifically, and the residue of his realty and personalty to others. By a codicil in June, 1890, he confirmed his will. On the same day but whether before or after the execution of the codicil was not known, he granted a lease of the specifically devised property with an option of purchase to the lessee. After the testator's death the lessee exercised the option. Held, by *Stirling, J.*, that there was sufficient indication of an intention to take the case out of the rule in *Lawes v. Bennett*, that the principle laid down by *Wood, V.C.* in *Wieding v. W.* (f), applied, and that the specific devisees were entitled to the proceeds of sale.

In *Reynard v. Arnold* (g), a tenant who had an option of purchasing the property, was bound to insure against fire, and it was agreed that all moneys recovered under the insurance should be applied in reinstating the premises. He insured in a sufficient sum. The premises were damaged by fire, and it then appeared that the landlord had a policy on the premises in another office, of which the tenant had no notice. Both policies had average clauses. The two offices apportioned the amount of loss between the two policies, and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase, and proposed that the insurance moneys under both policies should go to

(a) 1 Cox, 167, 1 R. R. 10.

(b) 14 V. 391, 9 R. R. 352.

(c) 3 Jur. (N. S.) 785.

(d) See *Emuss v. Smith*, 2 De G. & Sm. 722, and remarks of *Chitty, J.*,thereon in *Re Isaacs*, (1894) 3 Ch., p. 310.

(e) (1895) 1 Ch. 724.

(f) 1 John. & H. p. 431.

(g) 10 Ch. 386.

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part payment of the purchase-money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this, brought ejectment against him. It was held, that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property, after the tenant had exercised his option of purchase. It is obvious that the money which the lessor had received from the insurance office was the measure of the injury which he had done to the lessee by diminishing his rights to receive under his policy, see observations of *Fry, J.*, in *Edwards v. West* (a).

Until, however, the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate. Thus, in *Townley v. Bulwell* (b), a testator granted a lease to Townley for thirty-three years, with a proviso that "if Townley, his executors, administrators, or assigns should be desirous to purchase the premises within six years, he, Townley, should pay to the testator, his heirs or assigns, 600*l.*" The testator died without having devised the premises, and before the expiration of the lease Townley declared his option to purchase. It was held by *Eldon, C.*, upon the authority of *Lives v. Bennett*, that from the time of the option Townley was entitled to the premises, and that he should pay interest upon the purchase-money, which money and interest he held to be personal estate of the testator, and which ought to go to his next of kin, but that the rents of the premises, until the option, belonged to the heir (c).

Where *after* the date of the contract giving the option, a specific devise is made of the property subject to it, and a general bequest of the personal estate, the purchase-money will go to the specific devisee, when the option is exercised (d). Where such a will is made *before* the contract the proceeds of sale will go to the residuary legatee (e).

Where a person has an option given to him of purchasing land at

(a) 7 C. D. 864.

(b) 14 V. 591, 9 R. R. 352.

(c) See also *Ex p. Hardy*, 30 B. 206; *Collingwood v. Row*, 3 Jur. (N. S.) 785, 26 L. J. Ch. 649, 5 W. R. 484; *Goold v. Teague*, 7 W. R. 84; *Weeding v. W.*, 1 John. & H. 424; *Woods v.*

Hyde, 10 W. R. 339.

(d) *Drant v. Vause*, 1 Y. & C. 580; *Collingwood v. Row*, 5 W. R. 484.

(e) *Weeding v. W.*, 1 John. & H. 424; *Goold v. Teague*, 7 W. R. 84; *Emuss v. Smith*, 2 De G. & Sm. 722.

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a fixed price, and the land is purchased for a larger sum by a company under parliamentary powers before the time for exercising the option arrives, the person having the option will be entitled to the difference between the price fixed for him and the sum given by the railway company (a).

An option to purchase the fee simple of the premises given by a covenant of the lessor to the lessee of a term of years, his executors and administrators, is attached to the lease, and will pass with it to the personal representative of the lessee. In *Re Adams (b)*, on the death intestate of the lessee, his heir-at-law, who was also his administrator, nearly twenty years afterwards called on the devisee of the lessor to convey the fee simple to him, and a conveyance was executed accordingly, and the heir afterwards contracted to sell part of the property thus conveyed to him. The C. A. held that the option to purchase was attached to the lease and passed with it as part of the lessee's personal estate to his administrator, and that the administrator could not make a good title to the purchaser, unless the next of kin of the lessee would concur in the sale. Also that if the lease had been simply assigned by the lessee without any more words, the option would have passed with it to the assignee (c). An option may give a mere personal right, not exercisable after the death of the person to whom it is given (d).

7. Election to take Property Unconverted.

Who may Elect.—The notional conversion hereinbefore considered may be put an end to by an absolute owner, who, being *sui juris*, is competent to do so, electing to take the property in its actual state, and the Court will not direct a conversion against this election, because, when converted, he might immediately reconvert it, for, as is quaintly observed by Lord Cooper, in *Sedgely v. Mayo (e)*, "Equity like nature, will do nothing in vain." So where trustees have a power to sell land comprised in a will or settlement, the *cestui que trusts* where the property has become vested in them absolutely and they are *sui juris*, may by electing to take the property as it stands, put an entire end to the trusts (f), but if they do not make such election the trustees may exercise the power, if such appears to have been the intention of the testator or settlor (g). So where

(a) *Re Cant's Estate*, 4 De G. & J. 503, 1 Gif. 12; *Ex p. Hardy*, *Re Kerry*, W. N. ('89) 3.

(b) 27 C. D. 361.

(c) *Ibid*; per *Pearson, J.*, 24 C. D. 206, *Re Adams*.

(d) *Re Cousins*, 30 C. D. 203.

(e) 1 P. W. 389.

(f) *Re Cotton's Trustees*, 19 C. D. 624.

(g) *Ib.*

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the obligation to lay out money in land and the right to call for the money centre in the same person the obligation is at an end, and the property is "at home" (*a*).

An infant cannot ordinarily elect (*b*), but the Court may sanction his election or elect for him (*c*).

A lunatic cannot elect, and the right will not, where it can be avoided, be exercised by the Court (*d*).

A married woman under the old law is incompetent to elect by a contract or ordinary deed (*e*).

But by the Fines and Recoveries Act (*f*), a married woman, with the concurrence of her husband, can, by deed executed in compliance with its provisions, make her election to take or dispose of money to be laid out in land (*g*). So, likewise, a married woman may by a similar deed, elect to take real estate directed to be converted into money (*h*), even though her interest be reversionary (*i*), and the husband, it seems, would not be precluded from concurring in a deed, by his having previously executed a deed in favour of creditors, or having been made bankrupt and obtained his discharge (*k*). If there be a fund in Court impressed with the character of realty, a married woman, upon being separately examined, may elect to have it paid out to her husband as personalty (*l*).

A married woman, however, is under no such disability as regards property which is settled to her separate use without restraint on anticipation, or of which is her separate estate by virtue of the Married Women's Property Act, 1882. And under the Lands Clauses

(*a*) *Chichester v. Bickerstaff*, 2 V. 295; *Pulteney v. Darlington*, 7 Bro. P. C. 530; *Chandler v. Pocock*, 16 C. D. 648 (a general power of appointment by will). Cf. *Re Cleveland's S. E.*, (1893) 3 Ch. 244; *Re Daveron*, *Ib.*, p. 425.

(*b*) *Carr v. Ellison*, 2 Bro. Ch. 56; *Van v. Barnett*, 19 V. 102; *Spencer v. Harrison*, 5 C. P. D. 97.

(*c*) *Robinson v. R.*, 19 B. 494; *Jessop v. Watson*, 1 My. & K. 665; see p. 366, *infra*.

(*d*) *Ashby v. Palmer*, 1 Mer. 296; *Re Wharton*, 5 De G. M. & G. 33; *Dixie v. Wright*, 32 B. 662; *Wilder v. Pigott*, 22 C. D. 263. See p. 365, *infra*.

(*e*) *Oldham v. Hughes*, 2 Atk. 452; *Frank v. F.*, 3 My. & C. 171; *Spencer*

v. Harrison, 5 C. P. D. 97. Cf. *Cahill v. C.*, 8 App. Cas. p. 426; *Harle v. Jarman*, *infra*.

(*f*) 3 & 4 Will. 4, c. 74, ss. 40, 71, 77.

(*g*) See also *Forbes v. Adams*, 9 Si. 162.

(*h*) *May v. Roper*, 4 Si. 360; and *Briggs v. Chamberlain*, 11 Ha. 69; *Franks v. Bollans*, 3 Ch. 717; *Bowyer v. Woodman*, 3 Eq. 313.

(*i*) *Tuor v. Turner*, 20 B. 560; *Franks v. Bollans*, 3 Ch. 717; *Re Durrant*, 18 C. D. 106 (see these cases discussed, *Harle v. Jarman*, (1893) 2 Ch. 414).

(*k*) *Re Jakeman*, 23 C. D. 344.

(*l*) *Standerling v. Hall*, 11 C. D. 652; and see *Re Newton*, 23 C. D. 181.

(*m*) *Re Davidson*, 11 C. D. 341.

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Consolidation Act (a), she may dispose of her reversionary interest in real property to a railway company, so as to convert the proceeds into personalty (b). As to the right of a jointress to insist, after a sale of the land on which her jointure is secured, on reconversion, see *Waltrond v. Rosslyn* (c).

Person entitled subject to Charge.—A person entitled (subject to a charge) to real property vested in trustees upon trust for sale, may elect to take it as realty, and if he do so, and the trustees sell after the decease of the person so electing, his heir will be entitled to the residue after payment of the charge (d).

Delegated Power.—The power to reconvert or elect to retain property in its actual state may be delegated by the settlor to trustees or others, but it seems that they cannot exercise the power after the estate has become vested in persons absolutely entitled thereto (e), but *secus*, if it is a *trust*, and the necessity for the interference of the trustees continues (f), or if all the *cestui que trust* do not concur (g).

Tenants in Common.—Where an estate is directed to be sold, and the money arising from the sale to be divided among several persons, all of them must concur in electing to take the estate unconverted, for none of them has a right to say that any part shall not be sold, and elect to take his share in land; for, to allow election in such a case, would be injurious to the sale of the entirety (h). But if money be directed to be laid out in land, to the use of several persons as tenants in common, any one of them may elect to take his share of the money, for the residue of the money may be quite as advantageously invested in the purchase of land as the whole (i).

Remainderman.—The question, how far a remainderman can elect does not appear to be very clearly settled. If, however, in the case of money impressed with the character of land a remainderman were to elect to take it as money his election would be defeated upon the

(a) 8 & 9 Vict. c. 18.

(b) *Cooper v. Gostling*, 4 Gif. 449.

(c) 11 C. D. 640.

(d) *Re Gardner*, 1 Eq. R. 57; *Mutlow v. Bigg*, 1 C. D. 385; *Meek v. Dovenish*, 6 C. D. 566.

(e) *Doncaster v. D.*, 3 Kay & J. 26; *Rich v. Whitfield*, 2 Eq. 583; and see *Re Bird*, (1892) 1 Ch. 279.

(f) *Re Cooke's Contract*, 4 C. D. 454.

(g) *Biggs v. Peacock*, 22 C. D. 284. See *Re Tweedie and Mills*, 27 C. D.

315; and *Re Lord Sudeley*, (1894) 1 Ch. 334.

(h) *Deeth v. Hale*, 2 Moll. 317; *Smith v. Claxton*, 4 Madd. 484, 494; *Chalmer v. Bradley*, 1 J. & W. 59; *Trower v. Knightley*, 6 Madd. 134; *Elliott v. Fisher*, 12 Si. 505; *Holloway v. Radcliffe*, 23 B. 163, 171; *Re Davidson*, 11 C. D. 341, 348; *Re Heathcote*, 58 L. T. 43.

(i) *Seeley v. Jago*, 1 P. W. 389; *Walker v. Denno*, 2 V. jun. 152.

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tenant for life electing to call for an investment in land, and if the remainderman died intestate, his heir-at-law would be entitled upon the death of the tenant for life (a). It might, however, be supposed that if in such case the tenant for life died without having elected, the next of kin of the remainderman would be entitled (b). It seems, however, to have been laid down that a person in the position of a remainderman, whose interest in the nature of the property is uncertain, as being dependent upon the option of the tenant for life, cannot elect in such a manner as to change its nature: see *Sisson v. Giles* (c), where *Weston v. C.*, distinctly lays down the following proposition: that "in order to effect a reconversion, the parties directing it must be absolutely interested in the property in question. If they had only a limited or defeasible interest, there could be no reconversion" (d). A remainderman may, however, by act *inter vivos*, or by will, dispose of property, either as real or personal, so that he describes it in such a manner as to show what he meant to pass (e).

It has more recently been held that a person contingently entitled to the proceeds of real estate directed to be sold, may, pending the contingency, elect to take the estate as realty, and when the contingency happens, such election will become operative (f).

Tenant in Tail.—A tenant in tail of money to be invested in land might, as against his issue, whom he might bar by fine, elect to take it in its actual state, and upon his election immediate payment would be made to him by the Court (g). But where there were remainders over, payment would not be made to the tenant in tail except by the consent of the remainderman, who could only be barred by a recovery (h). "Upon a bill by a tenant in fee," says Lord *Hardwicke*, "the Court would decree it to be paid in money, because he might immediately sell the land and turn it into money; and the old rule was, that the Court would also decree it so upon a bill by tenant in tail, with remainders over. And thus it stood, till the

(a) *Holloway v. Radcliffe*, 23 B. 163; *Re Gardiner*, 1 Eq. 57.

(b) *Re Skeggs*, 2 De G. J. & S. 533; *Stead v. Newdigate*, 2 Mer. 521; *Gillies v. Longland*, 4 De G. & Sm. 372; *Re Polder*, 5 De G. M. & G. 890; *Re Stewart*, 1 Sm. & G. 32.

(c) 3 De G. J. & S. 614.

(d) And see *Meek v. Dovenish*, 6 C. D. 566; *Wallrond v. Rosslyn*, 11 C. D. 640.

(e) *Lingon v. Sowray*, 1 P. W. 172; *Harcourt v. Seymour*, 2 Si. (N. S.) 12; *Re Skeggs*, 2 De G. J. & S. 533.

(f) *Meek v. Dovenish*, *supra*; *Re Potter*, 3 Times L. R. 420; and see *Re Daveron*, (1893) 3 Ch. 421 (right of election when trust for sale void).

(g) *Cunningham v. Moody*, 1 V. 176.

(h) *Tratford v. Boehm*, 3 Atk. 440.

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case of *Cobwell v. Shadwell* (a), where Lord *Cooper* held the remainderman should have his chance, as it could not be barred but by recovery, which required time, and would not direct it to be paid in money; and the accident of the death of tenant in tail in that case, before a recovery, showed the remainderman's interest in so glaring a light, that it has established the precedent ever since. But where the remainder can be barred by fine the Court will decree it in money (b). It is not essential that the election by a tenant in tail alone, or a tenant in tail and the remainderman, should be made in a suit, for if the tenant in tail with remainder to himself received the money to be laid out in land from the trustees or if the tenant in tail with remainder to a stranger, with the concurrence of the remainderman, received it from the trustee, the election will be effectually made (c). By the Act for the Abolition of Fines and Recoveries (d), it is enacted, that money to be invested in the purchase of lands, to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall, for all the purposes of the Act, be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this Act, so far as circumstances will admit, are to apply to such money, in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled. It is now settled that a fund in Court representing entailed land will not be paid out without a disentailing deed (e). Where entailed land has been sold and the money is in Court, a subsequent deed purporting to disentail the land does not disentail the money (f). The costs of the disentailing deed must be paid by the company paying the money into Court (g).

How Election may be made.—Supposing the person competent to elect, election may be made either, 1. by express declaration or, 2. by acts from which the Court will presume an election to have been made. But neither declaration nor act must be equivocal (h).

(a) 1 P. W. 471, 485.

(b) *Cunningham v. Moody*, 1 V. 176.

(c) *Trafford v. Boehm*, 3 Atk. 448; *Bath v. Bradford*, 2 V. 590; overruling dicta in *Pulteney v. Darlington*, 1 Bro. Ch. 236; *Pearson v. Lane*, 17 V. 106.

(d) 3 & 4 Will. 4, c. 74, s. 71.

(e) *Re Broadwood*, 1 C. D. 438; *Re*

Reynolds, 3 C. D. 61.

(f) *Millington v. Fox*, 37 C. D. 153; *Shelford*, R. P. S. p. 290.

(g) *Ibid.*, and *Re N. Staffordshire R. Co.*, 3 Gif. 224.

(h) *Edwards v. Warwick*, 2 P. W. 171; *Dixon v. Gayfer*, 17 B. 433; *Griesbach v. Fremantle*, 17 B. 314; *Meredith v. Vick*, 23 B. 559.

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1. An express declaration to elect, though but slight (*a*), if it be unequivocal (*b*), may be made by parol (*c*).

Where a person entitled absolutely, or subject to a preceding life interest, to a fund to be invested in the purchase of land, bequeaths it by the description of so much money agreed to be laid out in land, this bequest will show a sufficient intention to elect to take the fund as personalty; and, therefore, being divested of the real uses, it would previous to the late Wills Act (*d*), have passed to the legatee, although the will was unattested (*e*). So likewise a person absolutely entitled to land notionally converted into money, will be held to have elected to take it in its present state, by a devise thereof as all his landed property at a particular place (*f*), especially if the devise thereof be to uses in strict settlement (*g*).

2. The presumption that a person has made an election will arise from very slight circumstances (*h*). Thus, if a person keeps land for some length of time unsold, a presumption will arise that he elected to take it as land (*i*), even when legacies to be payable out of the proceeds of the realty are unpaid, if the assent of the unpaid legatees to the election be expressed, or can from their conduct be inferred (*k*), and *a fortiori* where he has actually paid off a charge on such estate (*l*).

But the presumption will not arise when a person has been in possession for a short time only, more especially in the case where several are interested in common. In *Kirkman v. Miles* (*m*), where the persons entitled to the proceeds to arise from the sale of land had entered upon and occupied it for two years, and neither they nor the trustees had taken any steps to sell the estate, nor had they made any requisition to the trustees for that purpose, *Grant, M.R.*, held, "that only two years was too short to presume an

(*a*) *Wheldale v. Partridge*, 8 V. 236, 7 R. R. 37.

(*b*) *Stead v. Newdigate*, 2 Mer. 531; *Re Pedder*, 5 De G. M. & G. 890.

(*c*) *Edwards v. Warwick*, 2 P. W. 174; *Chaloner v. Butcher*, 3 Atk. 685; *Pulteney v. Darlington*, 1 Bro. Ch. 237; *Wheldale v. Partridge*, *supra*.

(*d*) 1 Viet. c. 26.

(*e*) *Pulteney v. Darlington*, 1 Bro. Ch. 235, 236; *Lechmere v. Carlisle*, 3 P. W. 215, and cases cited in note "C" thereto.

(*f*) *Sharp v. St. Sauveur*, 7 Ch. 343.

(*g*) *Meek v. Devenish*, 6 C. D. 573.

(*h*) *Pulteney v. Darlington*, 1 Bro. Ch. 238; *Van v. Barnett*, 19 V. 109; *Cookson v. C.*, 12 Cl. & Fin. 121; *Dixon v. Gayfere*, 17 B. 433.

(*i*) *Ashby v. Palmer*, 1 Mer. 301; *Crabtree v. Bramble*, 2 Atk. 688; *Dixon v. Gayfere*, 17 B. 433; *Griesbach v. Fremantle*, 17 B. 314; *Re Gordon*, 6 C. D. 531; *Re Davidson*, 11 C. D. 341; *Potter v. Dudeney*, 56 L. T. 395.

(*k*) *Mutlow v. Bigg*, 1 C. D. 385.

(*l*) *Re Davidson*, 11 C. D. 341.

(*m*) 13 V. 338.

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election" (a). The presumption will be sufficient where the person entitled to the money to arise from lands to be converted not only enters into the possession of the lands, but also takes into his custody the deeds without which the trustees could neither recover the estate, nor sell it: thus in *Darves v. Ashford* (b), real estates were, by marriage settlement, conveyed to trustees, in trust to sell, and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely; there was no child of the marriage. The husband survived his wife, and after her death got possession of the settlement and of the title-deeds, and remained in possession of them, and also of the estates, until his death. *Shadwell, V.-C.*, held that he thereby had elected to take the estates as land. "I admit," said his Honor, "that the settlement contained a clear trust for sale, which must have been exercised unless the husband did some act which shewed that he meant the trust to be at an end, and to take the estates as land. It does not distinctly appear in whose custody the title deeds originally were; but it is clear that there was a change in the possession of them and that the husband got them into his custody. Now was not that, of necessity, a destruction of the trust; for the trustees could not have compelled the husband to deliver up the deeds, and without doing so, they could not have made any effectual sale of the estates" (c). Where securities for monies were assigned to trustees, to be invested in land to be settled upon a man and his wife for life, with an ultimate limitation to the man's right heirs, and the husband died after some of the money had been put out upon other securities in trust for him, "*his executors and administrators*," Lord Keeper *Harcourt* held, that the husband had elected to take the securities as personal estate, upon the ground that the placing the money out upon different trusts was an alteration of the nature of it, since the testator's declaring the trust to *his executors and administrators*, seemed tantamount with his having declared that it should not go to his heirs (d). Upon the same principle, in the case of land to be converted into money, Lord *Hardwicke* held, that a grant of

(a) See also *Cookson v. C.*, 12 Cl. & Fin. 121; *Brown v. B.*, 33 B. 399; *Parker v. Williams*, 15 W. R. 1006; but see *Inwood v. Twyne*, 2 Eden, 148; *Crabtree v. Bramble*, 3 Atk. 688; *Re Davidson*, 11 C. D. 341; *Re Lewis*, 30 C. D. 634.

(b) 15 Si. 41.

(c) See also *Padbury v. Clark*, 2 Mac. & G. 298; *Brown v. B.*, 33 B. 399; *Sisson v. Giles*, 3 De G. J. & S. 611; *Potter v. Dudeney*, 56 L. T. 395.

(d) *Lingen v. Sowray*, 1 P. W. 172. See also *Cookson v. C.*, 12 Cl. & Fin. 121; *Harcourt v. Seymour*, 2 Si. (N. S.) 12.

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a lease reserving rent to the grantor, *her heirs and assigns*, was strong evidence of the intention of the grantor to elect that it should continue as land though she could not reserve otherwise (*a*). So it has been held that a new letting to a tenant from year to year, by a lessor entitled to the proceeds of land directed to be sold, will amount to an election, upon the ground that he would have been liable to an action by the tenant if the trustees had afterwards exercised the trust for sale, supposing that they had sold the estate and that the tenant had been evicted (*b*).

Election may be presumed from many circumstances taken together. In one case the fact that the person absolutely entitled to a sum of money to be invested in land, subject to a provision for his wife in bar of dower had included such sum in a statement of his personal property found among his papers after his death, was held to be of considerable weight (*c*), and in another case the execution of a deed by the parties interested in such sum describing it as *monies they were entitled to receive*, and trusts for investment in *securities* were declared, it was held to be a sufficient indication of their intention, to elect to take the sum of money in its unconverted state, although the trusts of the monies and securities were declared by reference to trusts of an instrument which assumed the conversion of the money into land (*d*).

Where the person absolutely entitled to money to be laid out in land receives the money from the trustees, he elects to take it as money (*e*), but not where he receives the income, although for a considerable time (*f*).

If trustees resist the demand of persons absolutely entitled to property to elect to take it unconverted such persons may get an injunction to prevent the trustees selling the property, provided the necessary provisions be made for charges thereon (*g*).

8. Conversion by the Court or Third Parties.

Where conversion is rightly made, whether by a court of competent jurisdiction or a trustee, all the consequences of a conver-

(*a*) *Crabtree v. Bramble*, 3 Atk. 680, 689; *Mutlow v. Bigg*, 1 C. D. 385; See also *Griesbach v. Fremantle*, 17 B. 314.

(*b*) *Re Gordon*, 6 C. D. 531, 537; but see *Meek v. Devenish*, 6 C. D. 566. Cf. *Potter v. Dudney*, 56 L. T. 395.

(*c*) *Harcourt v. Seymour*, 2 Si. (N. S.) 12.

(*d*) *Cookson v. Reay*, 5 B. 22; *Cookson v. C.*, 12 Cl. & Fin. 125.

(*e*) *Pulteney v. Darlington*, 1 Bro. Ch. 238; *Trafford v. Boehm*, 3 Atk. 440; *Rook v. Worth*, 1 V. 461.

(*f*) *Gillies v. Longlands*, 4 De G. & Sm. 372; *Re Pedder*, 5 De G. M. & G. 890.

(*g*) *Meek v. Devenish*, 6 C. D. 571.

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tion must follow: and there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found (*a*). But a wrongful conversion of property by trustees will not affect the interests of the *cestui que trusts*. Thus, if real property be wrongfully converted into personality, or personality into realty, each property so converted will be considered to retain its original character.

Lunatics.—When the conversion of land into money takes place by the direction of the Court in Lunacy, which must be presumed to have acted rightfully and lawfully (*b*), the interests of the real and personal representatives of the lunatic are unaffected thereby (*c*); but if the conversion is made without the direction of the Court, but *bona fide*, then, as there are no equities between the heir-at-law and the next of kin, they will take the properties to which they are respectively entitled according to the character in which they find them (*d*).

In the case of a lunatic, the Court will not in general alter the state of a lunatic's property so as to affect his successors, it will however do so when it is for the benefit of the lunatic himself, and in dealing with the property of a lunatic this principle is continually borne in mind by the Court. But even then it will interfere only with the greatest caution, and will do nothing unnecessary or uncalled for (*e*).

Acting upon this principle, if an application were made to sell a part of the real estate of a lunatic for the payment of debts, if the Court found that the maintenance of the lunatic would be better provided for, and his advantage promoted, by disposing of a real estate, inconvenient and ill-conditioned, and that it would be for the benefit of the lunatic so to pay the debts, and keep together the personal estate, the Court would have no difficulty in making an order upon such an application (*f*); So where a lunatic, seized *ex parte paterni* of estate A, and *ex parte materni* of estate B, the latter being subject to a mortgage, and timber cut upon A having been applied in discharge of the mortgage upon B, it was on a question between the heirs held that A. was not to be recouped (*g*). So timber may be ordered to be

(*a*) Per Jessel, M.R., *Steed v. Preece*, 18 Eq. 197, p. 369, *infra*; and see *Hyett v. Meakin*, 25 C. D. 742; *Re Bird*, (1892) 1 Ch. 279.

(*b*) *Re Smith*, 10 Ch. p. 84.

(*c*) Lunacy Act, 1890, s. 123.

(*d*) *Steed v. Preece*, *supra*.

(*e*) *Oxenden v. Compton*, 2 V. jun. 72; *Re Smith*, *supra*; *Re Pares*, 12 C.

D. 33; *Re Barker*, 17 C. D. 241; A.-G. v. Ailesbury, 12 App. Cas. 672; *Re Ryder*, 20 C. D. 314; *Re Tugwell*, 27 C. D. 309. See the Lunacy Acts, 1890, 1891.

(*f*) Per Eldon, C., in *Ex p. Phillips*, 19 V. 124.

(*g*) Per Eldon, C., in *Ex p. Phillips*, 19 V. 123, 124; but see *Re Leeming*,

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cut on a lunatic's estate, and applied in payment of debts or redemption of the land tax (*a*). And the produce of timber cut and sold by the order of the Court on a lunatic's estate, although it may not be wanted for any particular purpose, will be considered on his death as part of his personal assets (*b*).

But although the Court will not lightly change one species of property into another, it is because the lunatic on recovery may reasonably expect to find his property in the same state as when he became of unsound mind, and not because such changes might prejudice the interests of his representatives (*c*).

If the committees of a lunatic took upon themselves without leave of the Court for their own advantage to change the property of the lunatic, they would not be allowed to take advantage of their own fraud (*d*), but where the conversion is by a stranger tortiously, sensible there will be no re-conversion as between the real and personal representatives (*e*).

Infants.—Until the passing of the Wills Act (*f*) a distinction existed between an adult lunatic and an infant: an adult lunatic on his recovery always had, though by different modes, the same power of disposition both over his real and personal property; to convert, therefore, one species of property into another, would not injure the lunatic. An infant, however, before the Act, might dispose of personal estate before he attained the age of twenty-one, but he could not devise real estate until he attained that age (*g*). The Court, therefore, would not convert his personalty into realty, because that would deprive him of a power of disposition which the law gave to him over personalty; nor would it convert realty into personalty, because by so doing a power would have been conferred upon him contrary to the policy of the law (*h*). Where the Court is satisfied

7 Jur. (N. S.) 115, 3 De G. F. & J. 43; *Re Melly*, 49 L. T. 429.

(*a*) *Ex p. Bromfield*, 1 V. jun. 455. 457; *Ex p. Phillips*, 19 V. 118.

(*b*) *Ex p. Bromfield*, 1 V. jun. 453; S. C., 3 Bro. Ch. 510; *Oxenden v. Compton*, 2 V. jun. 69; S. C., 4 Bro. Ch. 231; *Ex p. Phillips*, 19 V. 118, overruling the dictum of Lord *Hardwicke* in *Anandale v. A.*, 2 V. 384.

(*c*) *Ex p. Anandale*, 1 Ambl. 81; *Awdley v. A.*, 2 Vern. 192; *Ex p. Bromfield*, 1 V. 463. And see cases cited note (*c*), p. 365 *supra*, and *Pope*,

Lunacy (1890), p. 161, and the Lunacy Act, 1890, s. 123.

(*d*) *Ex p. Ludlow*, 2 Atk. 407; *Ex p. Bromfield*, 1 V. 462; *Awdley v. A.*, 2 Vern. 192; so in the case of *Re Bulcock*, 4 My. & C. 440.

(*e*) *Anon.*, cit. 1 V. jun. 462.

(*f*) 1 Vict. c. 26.

(*g*) *Winchelsea v. Norcliffe*, 1 V. 437; *Ex p. Phillips*, 19 V. 124.

(*h*) *Ex p. Phillips*, 19 V. 122; *Witter v. W.*, 3 P. W. 99; *Rook v. Worth*, 1 V. 461; *Sergeson v. Sealey*, 2 Atk. 413; *Ashburton v. A.*, 6 V. 6;

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that it is for the benefit of the infant that property should be converted it will order a mortgage or sale, as for instance in the case of repairs (*a*). Even in the above cases (*b*) the conversion would be *sub modo* only, and if the infant die under twenty-one the converted personalty would pass to his administrator (*c*), and perhaps the rule laid down in *Re Badcock* (*d*) with regard to a lunatic's estate will be held applicable to an infant's, namely that personalty may be laid out in ordinary repairs, but if a large outlay is required, the money expended will retain in equity its character of personalty (*e*). Following the old distinction, however, the proceeds of timber cut on the estate of an infant would, it seems, be considered as part of the realty, and descend to the heir (*f*). A distinction was taken in the case of *Mason v. M.* (*g*), between the case of timber cut on the estate of an infant seised in tail, and an infant seised in fee, inasmuch as in the latter case the timber being taken as realty went to the infant absolutely, whereas in the former case, if it were taken as realty, it might go to the remainderman, and it ought therefore to be taken as personalty. And *Clarke, M.R.*, in a subsequent case, allowed the distinction (*h*).

Moreover, where the personal estate of the infant has been applied in paying off a charge or redeeming a mortgage, it has been ordered that it shall be considered as personal estate for the benefit of the infant (*i*). Lord *Eldon*, in a well-known case, says, "I have uniformly made it a rule, since I have sat here, where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision, that if he shall not attain the age at which he shall have a disposable power, the representative shall not be prejudiced in any degree by the act done by the Court

Ware v. Polhill, 11 V. 278; *Inwood v. Twyno*, 2 Eden, 152.

(*a*) *Ex p. Grimstone*, Amb. 708; *Inwood v. Twyno*, Eden, 148; *Re Jackson*, *Re Household*, 27 C. D. 533; *Conway v. Fenton*, 40 C. D. 312; and see *Settled Estates Act*, 1877, s. 34 (*n.*), *Shelford*, R. P. S. p. 656; *Settled Land Act*, 1890, s. 15.

(*b*) *Ex p. Grimstone*, *supra*; *Inwood v. Twyno*, *supra*.

(*c*) *Simpson on Infants* (1890), p. 355.

(*d*) 4 My. & C. 440.

(*e*) *Simpson on Infants*, pp. 355, 356, and see *Lewin*, p. 1102, par. 9.

(*f*) *Tullit v. T.*, Amb. 370, 1 Dick. 322; *Ex p. Phillips*, 19 V. 124; but see *Ex p. Bromfield*, 3 Bro. Ch. 516; and *Dyer v. D.*, *infra*.

(*g*) Amb. 371.

(*h*) *Tullit v. T.*, Amb. 371.

(*i*) *Ex p. Bromfield*, 3 Bro. Ch. 516; *Tullit v. T.*, 1 Dick. 323; but see *Ex p. Grimstone*, Amb. 708; *Zoach v. Lloyd*, cited 2 Vern. 192; *Donnis v. Buhl*, cited *ib.* 193; *Winchelsea v. Norcliffe*, 1 Vern. 436.

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in contemplation of the infants' benefit, in all the circumstance surprise or accident can throw round it" (a).

In the case of descendible freeholds of an infant the line of descent may be altered, by the act of a guardian of the infant, as by the renewal of a lease for lives of which the infant is seised *ex parte matrem*, for the new lease being considered as a new acquisition and vesting in the infant as a purchaser, will descend to the heirs *ex parte patrem*, as it is immaterial to the infant which of the heirs takes it. And it was said by *Hardwicke, C.*, "to be not like the case of an infant's personal estate turned into real; for the reason of that being still considered as personal estate, is, because of the different ages at which the infant might dispose of his personal and his real estate, and not out of favour to any one representative more than another" (b). But since the Wills Act the reason for the distinction, running through the decisions, between the conversion of the property of infants and lunatics, no longer exists; and the leaning of the Court appears to be to simplify the law by assimilating the case of infants to that of lunatics (c). It would seem, therefore, that where the Court for the benefit of an infant converts property of one description into property of another description, that, as in case of the property of lunatics similarly converted, it ought to go to the heir-at-law or next of kin, according to its character at the death of the infant. In *Dyer v. Dyer* (d), timber which was deteriorating was cut by order of the Court, and for the benefit of the estate, on the property of an infant, who was equitable tenant in fee subject to an executory devise over in the event of his dying under twenty-one without issue. He afterwards died under twenty-one without issue. It was held by *Romilly, M.R.*, that the proceeds of the sale of the timber were the personal estate of the infant, that so much of the realty was converted into personality, not when the order was made, but at the time when the timber was severed.

Where, however, during the life of a person having a limited interest, timber is directed to be cut on a settled estate, the proceeds of the timber will be considered as realty until some person absolutely entitled thereto elects to take them as personality (e). *Secus*, if the order be made upon the application of the remaindermen entitled in fee simple subject to the prior estate (f).

(a) *Ware v. Polhill*, 11 V. 278; see *Seton* (1893), p. 866, Form 17; A.-G. v. *Ailesbury*, 12 App. Cas. 672.

(b) *Pierson v. Shore*, 1 Atk. 480; *Mason v. Day*, Pr. Ch. 319.

(c) *Lewin*, p. 1102.

(d) 34 B. 304.

(e) *Field v. Brown*, 27 B. 90.

(f) *Phillips v. Daycock*, W. N. (1867), p. 34.

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Other Cases.—When realty has been converted by the Court or trustees for a particular purpose which does not exhaust the whole proceeds of the sale, the surplus is to be taken as personality. The decision of *Shadwell, V.-C.*, in *Jermyn v. Preston* (*a*), appears to be the other way. But in *Steel v. Pearce* (*b*), which was a suit by trustees for administration of the trusts of the instrument under which these persons were entitled, and also asking for partition (before the Act of 1868), a decree was made by which the Court being of opinion that a sale would be for the benefit of the infant defendant, and the adult defendant consenting, a sale was ordered. A sale was made under the decree, and the purchase-money paid into Court, and upon further consideration the adult's share was paid to him, and the infant's share carried to his separate account. The infant afterwards died without having attained twenty-one. *Jessel, M.R.*, after reviewing the authorities, and approving *Flannaghlan v. F.* cited in the judgment in the principal case (*supra*, p. 330), held that the fund in Court belonged to his legal personal representatives, and was not to be treated as realty; that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow; and the heir or any one else must take the property in the form in which it is found unless there be any equity in favour of the heir, or any one else, for re-conversion (*c*).

And where the Court in the exercise of its jurisdiction makes an order for the sale of real estate, the order itself, even in the case of an estate belonging to an infant, operates as an immediate conversion, and before any sale has actually taken place (*d*). The judgment itself may of course make a special provision, as where a decree ordering real estate *devised in strict settlement* to be sold for payment of debts, directed that if more were sold than was sufficient for that purpose the surplus should be laid out in land to be settled to the same uses as the devised estate (*e*).

Questions have arisen with regard to moneys arising from insurance against fire of settled property, whether they were to be considered as the personality of the party who had kept up the insurance on his real estate for the benefit of the parties entitled to the estate; where

(a) 13 Si. 356.

(b) 18 Eq. 192.

(c) *Foster v. F.*, 1 C. D. 588; *Battesto v. Maunsell*, 10 Ir. R. Eq. 97; *Re Barker*, 17 C. D. 241, sale of lunatic's real estate under Partition

Act, 1868; *Fowler v. Scott*, 19 W. R. 972; *Mildmay v. Quicke*, 6 C. D. 553.

(d) *Hyett v. Meakin*, 25 C. D. 735.

(e) *Fellow v. Jermyn*, W. N. (77) 95, and see *A.-G. v. Ailesbury*, *supra*.

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for instance during the infancy of a tenant in tail of freehold estates devised in strict settlement, part of which consisted of a corn mill let on lease, the rents were received by his mother on his behalf, and she thereout paid the premiums necessary for keeping up a policy which had been effected in her name for insuring the mill against fire. The will contained no provision for fire insurance. The mill having been burnt down, and it not being considered for the benefit of any person interested in the settled estates that it should be rebuilt, it was held that the insurance moneys belonged to the infant tenant in tail as his personal estate, and were not treated as real estate for the benefit of all persons interested in the settled estate (*a*).

An alien was entitled to take the proceeds of land agreed or directed to be sold (*b*), and by virtue of the 33 & 34 Vict. c. 14, s. 2, such person may now take, hold and dispose of real and personal property of every description.

Where the sale of property belonging to persons under disability is directed by the Court under the Partition Act, 1868, there is an equity for reconversion under the Settled Estates Act, 1877, ss. 34, 35, 36, which are imported into that Act (*c*). On the death, intestate, of the person entitled to the proceeds of a sale under the Partition Act in its reconverted estate, the heir-at-law will be entitled thereto, as money and not as realty. In *Mordaunt v. Bennett* (*d*) a decree for the sale of real estate having been made in a partition suit, the property was sold and the proceeds paid into court. Three of the persons entitled to the shares in the property died intestate before the money was distributed, leaving their father their heir-at-law and sole next of kin. He took out administration to each of them, and then died intestate. It was held that the father took his children's shares of the money as their heir-at-law, but that he took them as money, and that on his death they passed to his personal representative and not to his heir-at-law. Where, in a partition action, an order for sale is made at the request of the person under disability under the Partition Act (*e*), no such equity for reconversion arises (*f*). A married woman can, where such an equity

(*a*) *Warwicker v. Bretnall*, 23 C. D. 194.

(*b*) *Du Hourmelin v. Sheldon*, 1 B. 79; 4 My. & C. 525.

(*c*) *Foster v. P.*, *supra*, the case of an infant; *Mildmay v. Quicke*, *sup.*; *Re Lloyd*, 9 P. D. 65; *Fowler v. Scott*, 19 W. R. 972, married women; *Re*

Barker, 17 Ch. D. 41; *Grimwood v. Bartels*, 25 W. R. 843, lunatics.

(*d*) 19 C. D. 302.

(*e*) (1876) s. 6; *Shelford*, R. P. S., p. 748.

(*f*) *Wallace v. Greenwood*, 16 C. D. 362; *Howard v. Jalland*, (1891) W. N. 210.

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arises, signify her election to take the fund as separate estate by a separate examination (*a*), and if the proceeds of her share be under 200*l.* the Court will order the same to be paid out to her upon her separate receipt and upon an affidavit of no settlement, and will dispense with her separate examination (*b*).

Where money is paid into court, the produce of real estate converted by compulsory powers under Acts of Parliament, as under the 69th section of the Lands Clauses Consolidation Act, it in general remains in court subject to the rights of the parties interested in it to have it reinvested in land, and it is to be considered as money or personal estate in court, subject to a trust to be invested in land, and therefore *impressed with the quality of real estate* (*c*), until some act is done by the owner showing his election to take it as personalty (*d*). But the accumulations will be personal estate (*e*). It is not essential to the reconversion of the money paid into court under the 69th section, that the property should be in settlement, because the directions therein that such money is to be invested in the purchase of lands to be conveyed in the same manner as the lands taken "stood settled" means "stood limited," words applicable to an *estate in fee* of a person under disability (*f*). Where land belonging to a person of unsound mind has been taken under the Act, and the money paid into Court, and the landowner was found lunatic and died intestate, *Pearson, J.*, ordered the money to be paid out to her heir (*g*), dissenting from the decision of Lord *Cranworth* in *Ex p. Flannan*; a similar case (*h*). But where the payment in is made under the 78th section of the L. C. C. Act it will be treated as personalty (*i*).

By the Irish Church Act, 1869 (*k*), every advowson, with perpetual right of presentation to a living in the Established Church in Ireland, was converted into personalty, viz., the right to receive the compensation which should be assessed by the Commissioners; it was held that the executors of a testator and not the devisees of his livings were entitled to the compensation under the Act (*l*).

(*a*) *Standerling v. Hall*, 11 C. D. 632.

(*b*) *Wallace v. Greenwood*, *supra*; *Seton*, p. 789.

(*c*) *Re Stewart*, 1 Sm. & G. 32, 39; *The Midland R. C. v. Oswin*, 1 Coll. Ch. R. 80; *Re Taylor*, 9 Ha. 596.

(*d*) *Re Horner's Estate*, 5 De G. & Sm. 483; *Re Stewart*, 1 Sm. & G. 39.

(*e*) *Dixie v. Wright*, 32 B. 662.

(*f*) *Kelland v. Fulford*, 6 C. D. 491.

(*g*) *Re Tugwell*, 27 C. D. 309.

(*h*) 1 Si. (N. S.) 260.

(*i*) *Re Harrop*, 3 Drew. 726.

(*k*) 32 & 33 Vict. c. 42.

(*l*) *Frewen v. F.*, 10 Ch. 610.

ACKROYD v. SMITHSON (a).

*Lincoln's Inn Hall, 1780. 1 Bro. Ch. 503.*Resulting Trust on Failure of the Purposes for which Conversion
has been directed.

Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds arising from the sale, and the residue thereof he gave to certain legatees, in the proportion of their legacies. Two of the residuary legatees died, living the testator. These shares are lapsed; and so far as they are constituted of personal estate, shall go to the next of kin, and so far as they are constituted of real estate, to the heir-at-law.

CHRISTOPHER HOLDSWORTH bequeathed pecuniary legacies to certain persons, all which together with other legacies given by his will, he directed to be paid at the end of six months after his decease; and the said testator gave all his real estate not thereinbefore devised, and all his personal estate whatsoever, unto the defendants Smithson and Ibbetson, then heirs, executors, administrators, and assigns, *in trust that they should as soon as convenient after his decease, sell all his said messuages, &c., for such price or prices as could be got for the same, and thereby to convert such real and personal estate so to them devised, and every part thereof, into ready money, and by and out of the money arising by such sale to pay all his debts, legacies, and funeral expenses, and charges of proving his will; and after payment thereof, in trust out of such monies to arise as aforesaid, to pay all legacies and annuities thereby bequeathed, at the time and in the manner thereby directed; and if, after such payments made, and putting out of the funds, as thereby directed, for raising the annuities thereby given, and indemnifying his trustees from all charges, expenses, and loss which might attend*

(a) This report was copied by Mr. from Lord Redesdale's MSS.
Brown from the notes of Lord Eldon:—

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the carrying the trusts of his will into execution, there should remain an overplus in the hands of the trustees, which he apprehended there would be to a considerable amount, he directed that they and the survivors of them should, within six months after the same should be ascertained, pay the same unto his said legatees, in proportion to their several and respective legacies therein to them bequeathed; and the testator thereby willed and devised that two several sums of 250*l*. each, which he had therein directed to be put out on securities in the names of his trustees, and the interest arising therefrom to be respectively paid to M. Thackeray and R. Gaunt during their respective lives, should, upon the several deaths of them, the said M. Thackeray and R. Gaunt, be paid in the like proportions unto them his said several and respective legatees.

Benjamin Wright and Mrs. Molyneaux, two of the said legatees, died in the lifetime of the testator.

The bill was filed by the next of kin of the testator against the trustees, the surviving legatees and the heir-at-law claiming the legacies given to the deceased legatees, their shares in the overplus, and in the two sums of 250*l*. as lapsed and become part of the personal estate of the testator.

The cause came on at the Rolls, 10th July, 1778, when his Honor (Sir *Thomas Scrutton*), being of opinion that the surviving legatees took the whole residue, in proportion to their several legacies, dismissed the bill without costs.

From this decree the plaintiffs appealed to the Lord Chancellor *Thurlow*, and, the cause coming on to be heard before his Lordship,

Mr. Kenyon attempted to support the decree.

But Lord Chancellor *Thurlow* being clear (without hearing much argument) that this was a tenancy in common in the residue, and that, therefore, the shares of the legatees who died in the testator's lifetime were undisposed of, said the only question was, whether such shares belonged wholly to the next of kin or to the heir-at-law.

The *Attorney-General* (a), Mr. *Maddocks* and Mr. *Selwyn* (for the plaintiffs, next of kin), contended, that the testator had converted his

(a) Alexander Wedderburne, Esq., afterwards Earl of Rosslyn.

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real estate into money out and out; that he had mixed two funds, and made all personal estate; that the cases, therefore, of *Mallabar v. M.* (a), and *Darrou v. Mutton* (b), must govern the decision here, and that the blending the funds distinguished this case from that of *Digby v. Legard* (c). Mr. *Selwyn* mentioned the cases of *Flanagan v. F.* (d), *Fletcher v. Ashburner* (e), and *Ogle v. Cook* (f).

Lord Chancellor *Thurlow* thought the two former cases did not apply, but being in general of opinion with the counsel for the next of kin, asked the counsel for the heir-at-law upon what grounds they could support his claim.

Mr. *Scott* (g), for the heir-at-law, said, they claimed on his behalf such interest in the monies produced by the sale of the testator's real estates, as the deceased residuary legatees would have been entitled to, if they had survived the testator; or so much of their shares of the overplus now in the events which have happened, undisposed of, as is constituted by the produce of the testator's real estate. That the heir-at-law is entitled to every interest in land not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir-at-law to deny that the intention of the testator has designed him nothing; his intention has certainly been equally unpropitious to his next of kin; but it is not enough that the testator did not intend that his heir should take: he must make a disposition in favour of another; if he has not actually disposed of all his real estate, if he has not made an universal heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and *a fortiori* in a case where he has expressed no intention, to the *hæres natus*. If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted upon both hearings, that the benefit of lapsed devises would, according to the case of *Digby v. Legard*, and the principle of the case of *Enblym v. Freeman* (h), and of many

(a) Cas. t. Talbot, 79.

(b) 1 V. 320.

(c) Cited 1 Bro. Ch. 501.

(d) Cited 1 Bro. Ch. 500.

(e) 1 Bro. Ch. 497, ante.

(f) 1 Bro. Ch. 501.

(g) Afterwards Earl of Eldon, from whose notes this argument is taken.

(h) Pr. Ch. 541.

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others, have accrued to the heir-at-law. It is admitted, and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir-at-law shall take; because there is an end of the disposition when there is an end of the purposes for which it was made; but it is contended here, the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate; that he intended to convert it out and out; that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases, therefore, of *Duport v. Motteux*, and *Mollabar v. M.*, are authorities in point that the whole fund is personal. We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all questions between real and personal representatives. But we insist, that if he has not actually and eventually so decided, they, upon whom the law casts the title to personal estate, can no more claim in a court of equity money arising from the sale of land, than the heir can claim property admitted to be of a personal nature. As to the question of fact, whether he meant that in some event only, or that, in all events, the produce of his real estates should be considered as personalty, we admit that, in favour of his residuary legatees, he meant to convert the whole into personalty, in case all his residuary legatees should eventually take the whole, but we contend, that he has intimated no intention as to that part of the produce, as to which his disposition in the event which has happened has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property, which his legatees were to take; but, as to such part of the property as in the event they have not taken, he has not determined upon its nature, he never meant to determine upon its nature, as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place, which would give the one or the other an interest in his property and he designed no part of his property for either. In the event the one or other must take some part of it; but, to say he has made it all personal property, and that therefore the law must give it to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which had not

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occurred, for the sake of proving a similar intention, if circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favour of his next of kin, is to reason from a case in which intention is expressed to prove a like intention in a case which supposes the absence of intention; though the testator, therefore, intended that his legatees, if they had lived, should take their respective shares of such part of the general surplus as was produced by the sale of the real estates as money, he has not declared any intention relative to its nature, in case that particular intent of his should be disappointed. In the event, therefore, which has happened, it is so much money undisposed of, arising from the sale of lands. Such money in this Court is land, and as such the heir claims it. Suppose all the fifteen legatees had died in the lifetime of the testator, would it not have been competent to the heir-at-law to have insisted in equity, that no sale should be made of the real estate? Would it have been possible to contend that, because the testator had blended the funds, in order to make a disposition which never took effect, and without a view to any other given circumstances, that he had therefore blended them, if, in the event, he had made no disposition; that, because he had made the real estate personal, to give it to his residuary legatees, and to disappoint his heir, whether his residuary legatees did or did not, in the event, take the benefit of that disposition? The fact of his having blended the funds proves not a mere inattention, not mere indifference to the interest both of his next of kin and his heir-at-law, but it proves a purpose hostile to both. Can that fact, then, be a ground from whence to infer that, in a change of circumstances, he had a purpose of kindness and bounty to the next of kin, and adverse to the interest of the heir only? The reason of the intention ceasing, the intention should be taken to have ceased. The testator meant to change the legal qualities of his property, when he meant to alter the disposition which the law would make of his property; but if, in the event, the law was to make the disposition of any part of the property, he meant, for aught that appears to the contrary (and something must appear to the contrary, to defeat the claim of the heir), that the law which made the disposition should decide

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on the qualities of the property of which it was to dispose. It then, in case all the residuary legatees had died, the heir could have prevented a sale, is it to be said, that, because a sale must be made he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true, that where it is necessary that a sale should be made, to effectuate the testator's purposes which are capable of taking effect that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention. He then cited, distinguished and commented upon the following cases: *Emblay v. Freeman* (a), *Digby v. Legard* (b), *Mallabar v. M.* (c), *Durand v. Motson* (d), *Cause v. Barley* (e), *Flanagan v. F.* (f), *Scaddamere v. S.* (g), *Ogle v. Cook* (h).

LORD CHANCELLOR THURLOW reversed the decree, and directed an account to be taken of the personal estate, and the money arising from the sale of the real estate, and that the share of the deceased legatees in the overplus should be divided between the next of kin and the heir; that is, so much of those shares as was constituted of the personal estate, to the next of kin, and so much as was made up of the produce of the real estate, to the heir.

He said, that he fully approved the determination in *Digby v. Legard*. That he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money would be personalty, but the cases fully proved the contrary. It would be too much to say, that if all the legatees had died, the heir could, as he certainly might, he said, prevent a sale, and yet to say that, because a sale was necessary the heir should not take the undisposed part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said, he approved the instructions made on behalf of the heir, and decreed as before.

(a) Pr. Ch. 541.

(b) Cited 1 Bro. Ch. 501.

(c) Cas. t. Talbot, 79.

(d) 1 V. 320.

(e) 3 P. W. 20.

(f) Cited 1 Bro. Ch. 500.

(g) Pr. Ch. 513.

(h) As to which see *Collins v. Wake-*
man, 2 V. jun. 686.

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NOTES.

1. Resulting trusts on failure of disposition of money to arise from sale of land.
2. Resulting trusts when money is directed to be laid out in land upon uses which wholly or partially fail, p. 380.
3. How the heir and next of kin take property directed to be converted, p. 382.
4. When a residuary devise or bequest comprehends property which would otherwise have resulted to heir or next of kin, p. 384.
5. Undisposed-of interest where no heir or next of kin, p. 389.

1. Resulting Trusts on Failure of Disposition of Money to arise from Sale of Land.

In *Ackroyd v. Smithson*, it will be observed that the disposition of the money to arise from the sale of the real estate was *originally complete*, but a lapse by the death of two of the residuary legatees in the lifetime of the testator caused the failure of the disposition as to their two shares, which, although actually converted into money, resulted to the heir-at-law as undisposed-of real estate.

Since the case of *Ackroyd v. Smithson*, so celebrated for the elaborate argument of Mr. Scott, afterwards Lord Eldon, it has never been doubted, that, where a testator directs real estate to be sold, and the produce of the sale to be applied for a purpose which either wholly or partially fails, the undisposed-of beneficial interest will result to his heir-at-law and will not go to his next of kin, although the land may have been actually converted into money. Where a testator means, with regard to a particular purpose, to convert his real estate into personal, if that purpose cannot be served, the Court will not infer an intention to convert the estate for any other purpose not expressed (a).

The same result follows where money arising from land directed to be sold is given over on an event which does not happen. Thus in *Jessop v. Watson* (b), a testator directed a *moral fund*, composed of the produce of his real and personal estate (see the principal case) to be applied to certain specified purposes, and the residue to be divided among his children, or child, at twenty-one, if sons, and twenty-one or marriage if daughters, and if there was no child who should become entitled under the trusts, to such person as he should by his council appoint. The testator died without having made a

(a) Per Eldon, C., *Hill v. Cock*, 1 H. L. Cas. 656.
 V. & B. 175; *Bective v. Hodgson*, 10 (b) 1 My. & K. 665.

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colicil, leaving an only daughter, his heiress-at-law, who died under twenty-one, intestate and unmarried. *Leach, M.R.*, held, that so much of the residuary fund as was constituted of real estate descended to the heiress, and that so much as was constituted of personal property went to the next of kin (*a*).

So, where land is directed to be converted into money and the whole, or part, is given for a purpose which fails on account of illegality, the whole or part which, on this account, remains undisposed of, results to the heir-at-law as real estate. As, for instance, where money, to arise from the sale of land, is given to a charity, and the gift is void according to the Statute of Mortmain (*b*), or under the Act for the more effectual application of charitable donations and bequests in Ireland (*c*) by reason of the deviser dying within three calendar months from the execution of the will (*d*); or is limited so that the bequest is void, as violating the rule against perpetuities (*e*). In *Eyre v. Marsden* (*f*), accumulations were directed to be made out of the income of land to be converted into money, for more than twenty-one years from the death of the testator, and therefore void under the Thellusson Act (*g*), as to the excess of the accumulation over the twenty-one years, such void accumulations will result to the heir-at-law, and not to the next of kin. "It happens," observes *Langdale, M.R.*, "that there is a failure of the testator's intent. The income of the money arising from the sale of the real estates cannot be allowed to accumulate, and applied as the testator meant. The purposes of the will, as far as they can be lawfully carried into effect, do not exhaust the whole beneficial interest arising out of the real estate, and I think that the heir is entitled to the unexhausted interest." In *Simmons v. Pitt* (*h*), which was the converse case, a testator by his will disposed of an existing charge upon real estate directing it to be laid out in land and accumulations to be made out of the income thereof, so as to be partially good under the Thellusson Act: the charge was disposed of as personal estate, and was personal

(*a*) See also *Fitch v. Weber*, 6 Ha. 145; *Roberts v. Walker*, 1 Russ. & M. 752. *Ogle v. Cook*, cited in the principal case, is not an exception to the general rule: see *Collins v. Wakeman*, 2 V. jun. 686.

(*b*) 9 Geo. 2. c. 36; *A.-G. v. Weymouth*, Amb. 20; *Jones v. Mitchell*, 1 S. & S. 294; *Hopkinson v. Ellis*, 10 B. 169; and see *Brook v. Badley*, 3 Ch. 672; *Re Watts*, 29 C. D. 947.

(*c*) 7 & 8 Vict. c. 97, s. 16.

(*d*) *Hamilton v. Foot*, 6 Ir. R. Eq. 572.

(*e*) *Burloy v. Evelyn*, 16 Si. 290; *Buchanan v. Harrison*, 1 John. & H. 662; *Goodier v. Edmunds*, (1893) 3 Ch. 455; *Re Daveron*, ib. p. 421.

(*f*) 2 Keen, 564.

(*g*) 39 & 40 Geo. 3, c. 98.

(*h*) 8 Ch. 978.

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estate before it was appointed, and therefore the accumulations, so far as they were void, went, notwithstanding the direction to convert into land, to the next of kin as personal estate.

An express direction that the proceeds of the sale of real estate shall be deemed personalty will not prevent the operation of the rule in favour of the heir-at-law; for however absolute such direction for conversion may be it will be construed to extend to the purposes of the will only, and although a direction that the proceeds of real estate shall be deemed personalty be followed by an express declaration that the heir-at-law shall not take in case of lapse, he will not, *unless there be a disposition thereof*, be excluded from what the law in the absence of such disposition would give to him. Thus, in *Fitch v. Weber* (b), a testatrix devised and bequeathed her real and personal estate, in trust as to the real estate for sale as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale, *as a fund of personal and not real estate; for which purpose she declared such proceeds, or any part thereof, should not in any event lapse or result for the benefit of her heir-at-law*; and, after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should by any codicil to that her will direct or appoint. The testatrix made no codicil. Wigram, V.-C., after an elaborate examination of the authorities, held, that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will. See further on this point, Parts 3 and 4, post.

2. Resulting Trusts when Money is directed to be laid out in Land upon Uses which wholly or partially fail.

The principle upon which *Ackroyd v. Smithson* was decided, applies also to the converse case of money directed to be laid out in the purchase of real estate, devised to uses which partially fail, as well as those which wholly fail to take effect: for the undisposed-of interest in the money or the estate, if purchased with the money, will result for the benefit of the next of kin of the testator, and will not go to the heir-at-law. In *Cogan v. Stevens* (c), the testator

(a) See *Collins v. Wakeman*, Amplett v. Parke, Taylor v. T., 3 De G. M. & G. 190, overruling *Phillips v. P.*, 1 My. & K. 649; *Robinson v. London Hospital*, 10 Ha. 19; *Ellis v. Bartrum*,

25 B. 110; *Belford v. B.*, 35 B. 584, and Part 4, post.

(b) 6 Ha. 145.

(c) 1 B. 482 (n.).

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ordered that 30,000*l.* should be laid out immediately by his executor in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which should belong to his widow during her life, and after her decease to certain persons (all of whom died during the life of his widow, without issue), in tail, with remainder to a charity. The money was not laid out, and the gift to the charity being void under the Statute of Mortmain (a), it was held by Lord Cottenham, that the next of kin, and not the heir-at-law of the testator, was entitled to the fund. "The result of the whole authorities," said his Lordship, "seems to be, that, before *Ackroyd v. Smithson*, no distinction was recognised between the doctrine as applicable to a conversion of money into land, or land into money; that, as to both, an opinion prevailed that when a conversion was necessary, and part of the object failed, the unappropriated proceeds belonged to that representative on whom the law cast that description of property in which such proceeds were found to exist. This, as to land converted into money, was corrected in *Ackroyd v. Smithson*; but no case has occurred in which the point has been argued and determined as to money converted into land. I say argued and determined, because, if determined in *Leslie v. Dunshire* (b), and *Fletcher v. Chapman* (c), it certainly was not argued; but there are undoubtedly *dicta* of very eminent Judges since that time, which seem to show an impression on their minds that the principle of *Ackroyd v. Smithson* was not to be applied to a conversion of money into land. Those learned Judges had not the benefit, which I have had, of hearing the point fully and most ably argued; and having, after the fullest consideration, come to the conclusion that that principle does apply to the present case, and as I am not bound by any of the authorities to maintain a distinction which was not originally supposed to exist, and which cannot be maintained in reason, and which, therefore, if maintained, would be a reproach to the law as it stands, I feel myself fully justified in preserving the uniformity of the rule, as applicable to the two cases, by deciding against the claim of the plaintiff; and I may be allowed to express some satisfaction in finding I am not compelled by authority to hold that any heir should take, as such, what had no inheritable quality, but was pure personal estate at the death of the ancestor's death, or that, as devisee, he should take that which was never destined for him, but was in most unquestionable terms given

(a) See now the Mortmain and Charitable Uses Act, 1891, s. 7.

(b) 2 Bro. Ch. 187.

(c) 3 Bro. P. C. 1.

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to another" (c). As to whether the next of kin take the property resulting to them as real or personal estate, see Part 3.

3. How the Heir and Next of Kin take Property directed to be converted.

Conversion absolute—Partial Failure of Objects of.—Where an absolute conversion of land is directed for the *general purposes of the will*, and some of these purposes fail, yet, the conversion being effectual, the surplus proceeds of the land sold, and the unsold land, both result to the heir *as personal estate*, and if the heir is dead goes to his personal representatives. In *Re Richerson, Seales v. Heghoe* (b), a testator devised his real estate upon trust for sale, and directed that the proceeds should form part of his residuary personal estate, which he bequeathed to a class which failed. In 1890 the trusts came to an end. Part of the land was sold, part was unsold. The heir had died in 1872 intestate. *Chitty, J.*, held that the proceeds of the real estate sold, and the realty unsold, both went to the personal representative of the heir (c); and probate duty is payable upon the land unsold (d). *Scilicet*, that in such a case as the above, no act on the part of the heir electing to take such partial interest as real estate would change its character (e).

Conversion absolute—Entire Failure of Objects of.—If there is a total failure of the objects for which conversion was directed, the heir will take the estate as realty, descendible to his heir, and devisable only by will, attested so as to pass real estate (f). And a sale unnecessarily made by trustees will not vary the rights of the parties, as the proceeds will in that case be considered as the real estate of the heir (g). If the testator were seised *ex parte maternâ*, his heir in the maternal line will be entitled (h).

(a) See also *Hereford v. Ravenhill*, 1 B. 481.

(b) (1892) 1 Ch. 379.

(c) See *Wright v. W.*, 16 V. 188, 10 R. R. 161; *Smith v. Claxton*, 4 Madd. 484; *Dixon v. Dawson*, 2 S. & S. 327; *Jessop v. Watson*, 1 My. & K. 665; *Hatfield v. Pryme*, 2 Coll. Ch. R. 204; *Wilson v. Coles*, 28 B. 213; *Wall v. Colshend*, 2 De G. & J. 683; A.-G. v. Lomas, 9 Ex. 29; *Hamilton v. Foot*, 6 Ir. R. Eq. 572, 578.

(d) A.-G. v. Lomas, *supra*.

(e) *Jarman*, (1893) 566; see *Re Wragg*, 63 L. T. 219.

(f) *Chitty v. Parker*, 2 V. jun. 271. See remarks on this case in A.-G. v. Lomas, *supra*; *Bagster v. Fackerell*, 26 B. 469; *Buchanan v. Harrison*, 1 John. & H. 602.

(g) *Davenport v. Coltman*, 12 Si. 610; *Cooke v. Dealey*, 22 B. 196; cf. *Bowra v. Rhodes*, 31 L. J. Ch. 676; *Re Richerson*, (1892) 1 Ch. p. 383.

(h) *Hutchison v. Hammond*, 3 Bro. Ch. 128; *Wood v. Skelton*, 6 Si.

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In *Smith v. Claxton* (a), *Leach*, M.R., said: "Where a devisor directs his lands to be sold, and the produce divided between A and B, the obvious purpose of the testator is, that there shall be a sale, for the convenience of division; and A. and B. take their several interests as money, and not land. So, if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor, that there shall be a sale for the convenience of division, still applies to the case: and the heir will take the share of A. as A. would have taken it—as money, and not land. But in the case put, let it be supposed that A. and B. both died in the lifetime of the devisor, and the whole interest in the land descends to the heir, the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being, that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed; and the heir would, therefore, take the whole interest as land (b)."

Conversion directed for Particular Purpose.—Where a conversion is directed not absolutely, for all the purposes of the will, but for a particular purpose, such as payment of debts, all that is not required for that purpose results to the heir as land, as if the conversion had entirely failed (c).

Where trust to Convert is illegal.—See *supra*, p. 379.

Personal Estate.—The same principles apply in the case of personalty directed to be converted. If it is directed to be laid out in land for the general purposes of the will, it goes, if the trusts partially fail, to the next of kin as real estate (d); both the personalty which has been so invested, and that which has not (e).

170; *Buchanan v. Harrison*, 1 John. & H. 673. *supra*.

(a) 4 Madd. 492.

(b) See also *Bagster v. Fackerell*, 26 B. 469; *Wall v. Colshedd*, 2 De G. & J. 683.

(c) *Wright v. W.*; *Re Richerson*,

(d) *Curteis v. Wormald*, 10 C. D. 172; overruling *Reynolds v. Godlee*, Johns. 336; and cf. *Cogan v. Stevens*, 1 B. 482, *supra*, p. 380.

(e) See *Re Richerson*, *Scales v. Heyhoo*, (1892) 1 Ch. at p. 384.

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this argues either a very strong memory or a pretty strong assurance in swearing. But the express gift, as he swears, is only of the three receipts. That is the form of the gift. Taking it therefore according to the substance of the gift, that this amounted to a declaration that Fly, by giving these receipts, intended to give the annuities, upon this the principal point arises, whether delivery of the thing given by way of donation *mortis causâ* is necessary; and, if necessary, whether this delivery of the receipts is sufficient delivery of the thing given by way of donation *mortis causâ*? I am of opinion, that delivery is necessary to make good such a gift, and that the delivery of these receipts for the consideration-money of the purchase of them was no sufficient delivery to validate this act. To clear this, it is proper to consider the notion of a donation *mortis causâ*, according to the civil and Roman law, and the law of England.

According to the civil and Roman law there is a great variety, and several passages therein are pretty difficult to reconcile (*a*). Digest, lib. 39, tit. 6, Law 38, requires, that both donor and donee should be present at the time of the gift, "*quo præsens præsentibus dat*;" which looks as if delivery was intended at the time. It is "*quo*" there, and in several editions: but in the Lyons edition of Gothofredus' Corpus, it is "*quod*;" which makes it sense. Next, in Digest, same tit., parag. 1, it speaks of it throughout as a restoring of the same thing, if the donor should recover: as if a restitution was to be. It is proper to take notice, that in the Roman law there were *three* kinds of donations *mortis causâ*. And in Voet on the Pandect, lib. 39, tit. 6, parag. 3, in his 2nd vol., p. 710, the division is agreeable to that made of these donations by Swinburne. The first is a donation by one in no present danger, but in consideration of mortality if he died; and this is strictly compared to a legacy; for the property was to pass at the death, not at the time. The second kind is, where the property passed at the time, defeasible in case of an escape from that danger in view, or of recovery from that illness. The third was, where, though he was moved with the danger, yet not thinking it so immediate as to vest the property immediately in the person, but put in possession of the person as an inchoate gift, to take effect in case he should die. Vinius's

(*a*) See Tate v. Hilbert, 2 V. jun. 111, 2 R. R. 175; and Agnew v. Belfast, &c. Co., (1896) 2 Ir. R. p. 209.

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Comment. on this place of Justinian is more particular—puts the remedy by action the donor might have, in case he repented or revoked. That is, on the last kind of donation *mortis causæ*, where he did not part with the property immediately, he should have a real action; but where he actually parted with the property, but the gift was to be defeated by his revocation or recovery, or escape from that danger he was in, *condictio in habuit* (which is a personal action) to make the irritancy, or to recover damages for the thing: so that it differed not but in the nature of the action. And in Calvin's Lexicon, &c., that is the distinction. Swinburne, on the text I have quoted, implies there should be a delivery; saying, that legacies differ from such donations, for that legacies are not delivered by the testator, but to be paid or delivered by the administrator; putting the distinction upon the one being delivered in life, the other after death. But, notwithstanding this, several books in the civil law import the contrary; particularly Vinius, in his Comment., lib. 2, tit. 7, sec. 1, numero 2; Covarruvias, vol. 1, rub. 3, and Voet on the Pandect, same chapter, num. 3 and num. 6, which passages show the different expression and opinions, some importing a delivery, others not. I have mentioned them to come at that which seems the distinction, reconciling them all, according to what is laid down by Voet, num. 6, that they did not require an absolute delivery of possession to the first or third kind of gift I have mentioned; but, in the other case, where the property was to pass immediately, it was required; which is the meaning of the expression in Voet, "*in mortis causæ donatione dominium non transit sine traditione*" and of that other expression in Voet. With this distinction, those passages in the civil law are properly reconciled.

Though I know these donations *mortis causæ* could never come directly in question in the Ecclesiastical Court, they might collaterally; and on these two heads I enquired whether there have been any cases there upon this, viz., in suits against an administrator on account of assets by the next of kin, where the administrator had insisted he could not administer such a part, because it was given *mortis causæ*; or, if there is a will, in which there are specific legacies, and one of those legacies he had given in his life by way of donation *mortis causæ*, there it might come in question in the Ecclesiastical Court; but I cannot find it has. The nearest case to

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it is *Ousley v. Carrol* (a), June, 1722, in the Prerogative Court, before Dr. *Bellesworth*. There was left a writing in the presence of three witnesses, not in the form of a will but a deed, viz.: "I have given and granted, and give and grant, to my five sisters, and children of the sixth, their heirs, executors, and administrators, in case they survive me, all my goods and chattels, and real and personal estate, and all which I may claim in right of my own, whether alive or dead." The dispute was by a person claiming as his wife, and who had been so, but divorced, who insisted this was no will, but a deed of gift *mortis causæ* (and a gift *mortis causæ* may be made in writing as well as otherwise, and so it might by the Roman and civil law); but the Ecclesiastical Judge was of an opinion this was testamentary, proved it as such, as a testamentary act, and probate was granted, from which there was no appeal; but a case was there cited of *Shargold v. Shargold*, upon a deed of gift by Dr. Pope, not to take place until his death, and sixpence delivered by way of symbol, to put the grantee in possession; that was pronounced for as a will, not as a donation *mortis causæ*; which I mention to show how far the Ecclesiastical Court has considered these things as testamentary.

Having considered these donations, the different species, and how far delivery is necessary by the Roman and civil law, I will consider it according to the law of England. They are undoubtedly taken from the civil law; but not to be allowed of here farther than the civil law on that head has been received and allowed. Taking the law of England to consist (as Hob. says) of rules of law and equity, it might have come in question in cases of action of trover and detinue; but I have never found any action on that head. Consider it, therefore, as in this Court, the civil law not binding here, but as far as received and allowed; which must be from adjudged cases and authorities, proving that the civil law has been received in England, in respect of such donations, only so far as attended with delivery, or what the civil law calls tradition, for which see Swinburne (who, being an English writer on the civil law, what he lays down is some evidence of what has been received here), Part 1, sec. 7; but, in other places, sec. 6, in tit. Definition of Legacy, he is still more express. In both places, in one directly, in the other collaterally, he lays down that delivery is necessary.

(a) See *Thorold v. T.*, 1 Phillim. 1; *A.-G. v. Jones*, 3 Price, 368.

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Next, consider it on the resolutions of this Court, the same thing results from them. There are not many cases on this head, and they are somewhat loose. The first is *Drury v. Smith* (a), where Lord *Cowper* founded himself on this, and the possession transmitted and changed: next *Lawson v. L.* (b). All that I can recollect from thence is, that the [gift of the] purse was held good, because delivered to the wife herself. As to the other legacy of 100*l.* bill, I cannot say on what it depended. It is a kind of compound gift; so many collateral circumstances are taken into it, that nothing can be inferred from it; but, being a draught on his goldsmith, that draught was delivered; so that it does not contradict what I lay down; and there was delivery, so far as it was capable. In *Jones v. Selby* (c), the result is, that the opinion of the Master of the Rolls was founded plainly on this, of the delivery of possession, holding, that the gift of the tally, as contained in the hair trunk, was a good donation *mortis causæ*; and that Lord *Cowper* avoided determining that, on the foundation of the subsequent point of a satisfaction or ademption, on which he grounded his determination. In all the instances, it is absolutely necessary to be the person's after the party's death; though, in some cases, it vest the property, in others not. But, to explain more fully Lord *Cowper*'s opinion there, I will refer you back to *Drury v. Smith*, and to *Healyes v. H.* (d), which turned on another point; but there Lord *Cowper* laid down a necessity of delivery very strongly; where he says, testator "gives with his own hands." *Sullygrove v. Bailly* (e), determined by me, 11th March, 1744, was urged, where a bond was given in prospect of death; the manner of gift was admitted; the bond was delivered; and I held it a good donation *mortis causæ*. It was argued, that there was no want of actual delivery there, or possession, the bond being but a chose in action; and, therefore, there was no delivery but of the paper. If I went too far in that case, it is not a reason I should go further, and I choose to stop there. But I am of opinion that decree was right, and differs from this case; for, though it is true that a bond, which is specialty, is a chose in action, and its principal value consists in the thing *in action*, yet some property is conveyed by the delivery; for

(a) 1 P. W. 404.

(b) 1 P. W. 411.

(c) Pr. Ch. 300.

(d) Pr. Ch. 269.

(e) 3 Atk. 214.

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the property is vested, and to this degree, that the law books say, the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a *profert in curiam* (a). Another thing made it amount to a delivery, that the law allows it a locality; and, therefore, a bond is *locum notabilia*, so as to require a prerogative administration, where a bond is in one diocese and goods in another. Not that this is conclusive; this reasoning I have gone upon, is agreeable to Jenk. Cent. 109, case 9, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there, I know not, but rather apprehend he applied it to a donation *mortis causâ*; for if to a donation *inter vivos*, I doubt he went too far.

Another case is *Miller v. M.* (b), which is a very strong case, so far as that opinion goes, to require delivery; which case, I believe, was hinted at as inconsistent with my decree; but there is a great difference between delivery of a bond, (which is a specialty, is itself the foundation of the action, and the destruction of which destroys the demand), and the delivery of a note payable to bearer, which is only evidence of the contract. Therefore, from the authority of Swinburne, and all these cases, the consequence is, that by the civil law, as received and allowed in England, and consequently by the law of England, *tradition or delivery is necessary to make a good donation mortis causâ*; which brings it to the question, whether delivery of the three receipts was a sufficient delivery of the thing given, to effectuate the gift. I am of opinion it was not.

It is argued, that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of *symbol* is sufficient; but I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this Court, delivery of the thing given is relied on, and not in the name of the thing, as in the delivery of sixpence, in *Shargold v. S.*; if it was allowed any effect, that would have been a gift *mortis causâ*, not as a will,

(a) An action may, however, now be brought without *profert*. See *Duffield v. Elwes*, 1 Bl. (N. S.) 543.

(b) 3 P. W. 356.

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but that was allowed as testamentary, proved as a will, and stood. The only case wherein such a symbol seems to have been held good, is *Jones v. Selby*; but I am of opinion that amounted to the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore, it was rightly compared to the cases upon 21 Jac. 1, as *Ryall v. Rowles* (a), and others. It never was imagined, on that statute, that delivery of a mere symbol in the name of the thing, would be sufficient to take it out of that statute; yet, notwithstanding delivery of the key of bulky goods, where wines, &c., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing; and, therefore, the key is not a symbol, which would not do. If so, then delivery of these receipts amounts to so much waste paper; for if one purchases stock or annuities, what avail are they after acceptance of the stock? It is true, they are of some avail as to the identity of the person coming to receive; but after that is over, they are nothing but waste paper, and are seldom taken care of afterwards. Suppose Fly, instead of delivering over these receipts to Mosely, had delivered over the broker's note, whom he had employed, that had not been a good delivery of the possession. There is no colour for it; it is no evidence of the thing, or part of the title to it; for suppose it had been in a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration-money, that would not have been a good delivery of the possession, nor given the mortgage, *mortis causâ*, by force of that act (b). Nor does it appear to me, by proof, that possession of these three receipts continued with Mosely from the time they were given, in February, to the time of Fly's death: for there is a witness who speaks, that, in some short time before his death, Fly showed him these receipts, and said, he intended them for his uncle Mosely. Therefore, I am of opinion, it would be

(a) 1 V. 348; p. 96, ante.

(b) That reasoning is quite idle unless Lord Hardwicke meant to say that delivery of the deed with a receipt upon the back of it, not by force of

the delivery of the receipt upon the back of it, but by force of the delivery of the deed, would be a good *donatio mortis causâ*. Per Lord Ebbon in *Dutfield v. Elwes*, 1 Bl. (N. S.) 543.

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most dangerous to allow this donation *mortis causâ*, from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called choses in action, there is less reason to allow of it in this case than in any other chose in action, because stocks and annuities are capable of a transfer of the legal property by Act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely; consequently, this is merely legatory, and amounts to a nuncupative will, and contrary to the Statute of Frauds, and would introduce a greater breach on that law than was ever yet made; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative. To this purpose, consider the clauses in the Statute of Frauds (a) relating to this; which seems to me to be applied directly to prevent a mischief of this sort. The clauses are in sections 19, 20, 21, 22 (b), which have very anxious provisions against dispositions of this kind, requiring three witnesses, solemn declaration of the testator, fixing the place of making, and to be reduced into writing in six days after making. These are in cases where no will was made. Next, comes another requisite, where a will has been made. If what the plaintiff insists on is right in point of law, that this gift of the annuities by delivery of the receipts was good, yet, though Fly had made a will before, it had been equally good, notwithstanding that will, because this relates to revocation of a will in writing by anything amounting to a testamentary act. It will be good against the will, as appears from the cases. Would not that be quite contrary to the plain provision of this clause, taking away delivery of the thing? Here is, then, a revocation of a will by words only, viz: "This is yours when I die;" all these clauses, therefore, will be overturned, if such evidence is admitted. But it is said, if this is not allowed, it will be impossible to make a donation *mortis causâ*, of stock or annuities, because in their nature they are not capable of actual delivery. I am of opinion, it cannot, without a

(a) 29 Car. 2, c. 3.

(b) These sections are repealed by 1 Vict. c. 26, s. 2; but as to the wills of soldiers on service, or mariners, and as to the wills of petty officers, sea-

men, non-commissioned officers of marines, and marines, so far as relates to money arising from service, see ss. 11 & 12, and 11 Geo. 4 & 1 Will. 4, c. 20.

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transfer, or something amounting to that : and there is no harm in it, considering how much of the personal estate of this kingdom, vastly the greatest proportion of it, subsists now in stock and funds ; and all the anxious provisions of the Statute of Frauds will signify nothing, if a donation of stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty, and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of the authorities ; and I am of opinion not to carry it further. If any doubt remains in any one's mind, I will add (what I very seldom do, though it has been done by my predecessors), that I should be very glad to have this point settled by the supreme authority ; for it highly ought to be settled, if there is a doubt, considering so large a property of this kind.

The bill ought to be dismissed therefore, without costs, as to the demand of these annuities, or any other part of the intestate's estate by way of donation *mortis causâ*.

But as there was a plain intent of bounty and kindness to this old man, who lived with him as a servant, and it seems, in expectation of what should be given at his death, therefore, on the other part of the bill an enquiry should be, what Mosely deserved over and above his maintenance, for services performed during the life of Fly. The account should be taken from a reasonable time, if the plaintiff thinks fit to pay it.

NOTES.

1. Generally.
2. Requisites to a *donatio mortis causâ*, p. 401.
3. What may be the subject of a *donatio mortis causâ*, p. 410.
4. Evidence, p. 413.

1. Generally.

In *Ward v. Turner*, which is a leading case on the doctrine of donations *mortis causâ*, Lord *Hardwicke*, with great learning, discusses the authorities upon the civil law, from which it has been

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imported into the law of England (*a*). In the subsequent case of *Tate v. Hilbert* (*b*), *Ward v. Turner* was commented on, and the civil law more fully explained, by Lord *Rosslyn*, in his very able judgment. A *donatio mortis causâ* is a sort of amphibious gift, between a gift *inter vivos*, and a legacy. It was not cognizable by the Ecclesiastical Courts because the title is derived from the donor in his lifetime, not from his will. It is properly a gift of property by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor die, but not otherwise (*c*). It may be made by parol, or by writing or deed (*d*), and the Wills Act (*e*) has not either in words or in effect abolished these donations (*f*).

Distinction between a donatio mortis causâ, and a donation inter vivos and legacies.—A *donatio mortis causâ* resembles a legacy, inasmuch as it is ambulatory and incomplete during the life of the donor, and may be revoked by him at any time before death, and is liable to his debts on a deficiency of assets (*g*), is subject to legacy duty (*h*), and might have been made to the wife of the donor (*i*): and in the above respects (except as to a gift to a wife) it differs from a gift *inter vivos*, and it also differs from a gift *inter vivos* in the following important particular, namely, that an incomplete voluntary gift *inter vivos* will not be perfected by the assistance of equity (*k*), whereas in the case of a *donatio mortis causâ*, equity will insist upon executors or administrators, as trustees for the donee, doing what may be necessary to complete the gift (*l*).

A *donatio mortis causâ* differs from a legacy, inasmuch as probate of it is unnecessary (*m*), and it is taken against, and not from, the executor, whose assent to its enjoyment is not necessary, and

(*a*) Cf. also *Duffield v. Elwes*, 1 Bli. (N. S.) 536. Articles in vol. ii. *Law Quarterly Review*, p. 444, and 90 *Law Times*, p. 140.

(*b*) 2 V. jun. 111, 2 R. R. 175; *Staniland v. Willot*, 3 Mac. & G. 674.

(*c*) *Story, Jur.* (1892), 606; *Williams, Executors* (1893), ch. 11, s. iv., and cases, post.

(*d*) See the principal case, and *Johnson v. Smith*, 1 V. 314; *Tate v. Hilbert*, 2 V. jun. 120.

(*e*) 1 Vict. c. 26.

(*f*) *Moore v. Darton*, 4 De G. & Sm. 517.

(*g*) *Smith v. Casen*, 1 P. W. 406.

(*h*) 8 & 9 Vict. c. 76; 44 Vict. c. 12, s. 38 (2).

(*i*) *Jones v. Selby*, Pr. Ch. 300; *Johnson v. Smith*, 1 V. 314; *Tate v. Leithead*, Kay, 658, 659; see now the *Married Women's Property Act*, 1882.

(*k*) *Ellisson v. E.*, post.

(*l*) See judgments of *Cotton* and *Lindley*, L.J.J., *Re Dillon*, 44 C. D., pp. 82, 83.

(*m*) See *Rigden v. Vallier*, 2 V. 258, note "Testamentary gifts," *infra*, p. 403.

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before the Judicature Acts, its validity might be tried by an action at law (a).

Where the property in a thing made the subject of a *donatio mortis causâ* does not pass by delivery, as, for instance, in the case of a bond, the donee may, upon indemnifying the personal representatives of the donor, sue in their names for the debt secured by such bond (b).

If the donor recover of his illness, or if he resume the possession of the gift, it will be defeated (c).

But if the donor does not resume the gift, he cannot revoke it by will, for upon his death the gift becomes complete (d). It was, however, decided in that case, that a *donatio mortis causâ* may be satisfied by a legacy.

It is clear that the donee may be put to his election if the subject of the donation is bequeathed to another person, and some benefit is conferred by the will upon the donee (e).

Practice.—By the Judicature Act, 1873, all the Divisions of the Supreme Court have concurrent jurisdiction in equity as well as in law; and any Division can entertain an action to establish a *donatio mortis causâ* (f). But where there is any such question, the usual and convenient course is to issue an originating summons under R. S. C. 1883, O. 55, r. 3, in the Chancery Division, and thereon if necessary an issue or inquiry may be directed (g).

Testamentary gifts.—If an instrument is clearly testamentary, that is, an instrument not intended to take effect until after the death of the person executing it, and dependent upon his death for its vigour and effect (h), and such instrument is not duly executed as a will, it will not be supported as a *donatio mortis causâ* (i).

(a) See *Thompson v. Hodgson*, 2 Stra. 777, and cf. note, "Practice," *supra*.

(b) *Gardner v. Parker*, 3 Madd. 184. See note, "Where the legal title does not pass by delivery," *infra*, p. 408.

(c) *Bunn v. Markham*, 7 Taunt. 231.

(d) See *Jones v. Selby*, Pr. Ch. 360.

(e) See *Johnson v. Smith*, 1 V. 314.

(f) See Judicature Act, 1873, ss. 16, 24, 25, and notes in *Annual Practice* (1896).

(g) *Duffield v. Elwes*, 1 Bli. (N. S.) 531; *Hanbrooke v. Simmons*, 4 Russ. 25; *Gillespie v. Croker*, 16 Ir. Ch. R. 182; *Re Dillon*, 45 C. D. 76; *Neilan v. Farrell*, 29 L. R. Ir. 12; and see *Seton* (1893), p. 1365.

(h) See *Cook v. C.*, 1 P. & D., p. 243.

(i) *Re Hughes*, 36 W. R. 821.

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But a gift in writing, without delivery, would probably be considered as testamentary (*a*).

2. Requisites to a Donatio mortis causâ.

The following circumstances are requisite in order to constitute a good *donatio mortis causâ* :—

1. The gift must be made by the donor in contemplation of the conceived approach of death (*b*) ; but a gift will be presumed to be so made, where the donor is “ in his last sickness,” or “ languishing on his death-bed ” (*c*), but not where suicide is contemplated (*d*).

2. The gift must be intended to take complete effect only after the donor's decease (*e*). But it is not absolutely necessary that the donor should expressly declare that the gift is to be returned to him if he recover, for if it be made in the extremity of sickness, or in contemplation of death, the law implies a condition, that it is to be held only by the donee in the event of the donor's death. Thus, in *Gardner v. Parker* (*f*), A. being seriously ill, two days before his death, in the presence of a servant, gave B. a bond, saying at the same time, “ There, take that, and keep it.” *Lord, V.-C.*, held the gift to be a *donatio mortis causâ*. “ The doubt,” said his Honor, “ here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness, and in contemplation of death ; and it is to be inferred, that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition, that it is to be held only in the event of death ” (*g*).

If, however, it appear from the circumstances of the transaction, that the donor intended to make an immediate or irrevocable gift, it will not be a good *donatio mortis causâ*. Thus, in *Edwards v. Jones* (*h*)

(*a*) *Rigden v. Vallier*, 2 V. 258 ; *Burrow*, 1 V. jun. 546, not found in 4
Tapley v. Kent, 1 Robert. 400 ; *Re Hughes*, 36 W. R. 821. Bro. Ch. 72.

(*b*) *Duffield v. Elwes*, 1 Bli. (N. S.) 330 ; *Edwards v. Jones*, 1 My. & C. 233, 236 ; *Hedges v. H.*, Pr. Ch. 269 ;
 2 I. R. 204. (*d*) *Agnew v. Belfast, &c. Co.*, (1896)

Walter v. Hodge, 2 Swans. 92, 100. (*e*) *Edwards v. Jones*, 1 My. & C. 233 ; *Tate v. Hilbert*, 3 V. jun. 120.

Art. 91 L. T. 92. (*f*) 3 Madd. 184. (*g*) See *Tate v. Leithead, Kay*, 658, 662 ; *Lawson v. L.*, 1 P. W. 441 ;

(*c*) *Miller v. M.*, 3 P. W. 356 ; *Miller v. M.*, 3 P. W. 358 ; *Jones v. Selby*, Pr. Ch. 300.

dictum of *Eyre, C.B.*, in *Blount v.* (*h*) 1 My. & C. 226.

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M. C., the obligee of a bond, five days before her death, signed an indorsement, not under seal, upon the bond as follows: "I, M. C., do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece E. E., with full power and authority for the said E. E. to sue for and recover the amount thereof, and all interest now due, or hereafter to become due, thereon." It was argued, that if the gift could not, in consequence of its being incomplete (a), take effect as a *donatio inter vivos*, it would take effect as a *donatio mortis causæ*. But Lord Cottenham held that it could not take effect as a *donatio mortis causæ*, as an absolute and irrevocable gift was intended (b).

Although there be an actual legal transfer of property such as, standing by itself alone, would amount to a complete gift *inter vivos* it will nevertheless be a *donatio mortis causæ* if there be annexed to the gift a condition either express or implied, that it is only to take effect in the event of the death of the giver, and upon his recovery the donee will be a mere trustee (c) unless there be a confirmation of the gift, so as to convert it into, or give it the effect of, an absolute irrevocable gift *inter vivos* (d).

3. Subject to the observations of the C.A. in *Re Dillon* (e), hereinafter referred to (f), there must also be a delivery or *traditio* of the subject of the gift, and of the dominion over it (g), to the donee for his own use (h); or upon trust for another person (i); or for a particular purpose, as in *Blount v. Barrow* (k), where the donor, twelve days before his death, delivered to the donee four India bonds, to enable him to carry on and maintain a law-suit, which the donor had commenced. This was held to be a good *donatio mortis causæ*, but an issue was directed to try whether the bonds were delivered.

A delivery in order to be effectual, must be made either to the donee himself or to some one for him. A mere delivery to an agent, in the character of agent for the giver, will not be sufficient (l); the

(a) See as to this, *Re Dillon*, 44 2 R. R. 175.

C. D., p. 82 and 409, 410.

(b) See also *Moore v. M.*, 18 Eq. 474, 484.

(c) *Staniland v. Willott*, 3 Mac. & G. 664.

(d) *Ib.* 681.

(e) 44 C. D. 76, 82, 83.

(f) P. 410.

(g) See note "Dominion" &c., p. 407.

(h) *Tate v. Hilbert*, 2 V. jun. 120,

(i) *Drury v. Smith*, 1 P. W. 405; *Farquharson v. Cave*, 2 Coll. Ch. R. 367; *Moore v. Darton*, 4 De G. & Sm. 517; and see *Bibby v. Coulter*, Ridg. Cas. t. II. 206, n.; *Dunne v. Boyd*, 8 Ir. R. Eq. 609.

(k) 4 Bro. Ch. 71.

(l) *Farquharson v. Cave*, 2 Coll. Ch. R. 356, 367; cf. *Moore v. Darton*, 4 De G. & Sm. 517.

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delivery also, when there are any declarations made by the donor relative to the subject-matter of the gift, should be contemporaneous with them (a).

It is said that a *donatio mortis causâ* cannot be made merely by parol, without delivery, as in the case of the alleged gift of the household goods and plate in the principal case (b). And in *Spratley v. Wilson* (c), Gibbs, C.J., held, but subsequently altered his opinion (d), that it was a sufficient delivery where a person *in extremis* said, "I have left my watch at Mr. R.'s at Charing Cross: fetch it away, and I will make you a present of it;" but if the donor has done all in his power to make the gift complete, then, possibly (e), his legal personal representatives would be compelled to perfect it.

In *Bunn v. Markham* (f) a person supposing himself *in extremis*, caused India bonds, bank notes, and guineas, to be brought out of his iron chest, and laid on his bed; he then caused them to be sealed up in three parcels, and the amount of the contents to be written on them, with the words, "For Mrs. and Miss C.," the plaintiffs; he then directed the brother to replace them in the iron chest, to be locked up, the keys to be sealed up, and directed "to be delivered to J." (his solicitor), and one of his executors, after his decease, and replaced in his own custody near his bed; and afterwards spoke of this property as given to the plaintiffs. It was held not to be a *donatio mortis causâ*, for want of a sufficient delivery, and on account of the donor continuing in possession (g).

Trust or Condition.—It was, indeed, argued in *Hambrooke v. Simmons* (h) that a *donatio mortis causâ* could not be coupled with a condition, or made subject to a trust; but as an issue was directed, which left the question of law, as well as of fact, to the consideration of a court of law, the point was not decided. However, in the subsequent case of *Hills v. H.* (i), where a person on her death-bed gave a pocket-book, containing 80*l.* in cash and notes, to

(a) *Thompson v. Heffernan*, 4 Dr. & War. 285; *Hawkins v. Blewitt*, 2 Esp. 664; *Dunne v. Boyd*, 8 Ir. R. Eq. 609.

(b) See *Tate v. Hilbert*, 2 V. jun. 120; *Smith v. S.*, 2 Stra. 955; *Wariner v. Rogers*, 16 L. R. Eq. 340.

(c) 1 Holt, 10.

(d) See *Bunn v. Markham*, 7 Taunt. 227, *supra*.

(e) See the judgment of Cotton, L.J.,

in *Re Dillon*, *supra*.

(f) 7 Taunt. 224.

(g) See also *Farquharson v. Cave*, 2 Coll. Ch. R. 356; *Walsh v. Studdart*, 4 D. & W. 159; *Thompson v. Heffernan*, 4 D. & W. 285; *Powell v. Hellicar*, 27 B. 261; *Maguire v. Dodd*, 9 Ir. Ch. Rep. 452; but consider *Re Dillon*, *supra*.

(h) 4 Russ. 25.

(i) 8 M. & W. 401.

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her brother, wishing that he should bury her, and that he should have all she had, it was held, in the Exchequer, by *Abinger*, C.B., *Parke*, B., *Alderson*, B., and *Rolfe*, B., that it was a good *donatio mortis causâ*, although coupled with a trust. "I cannot see," said Mr. Baron *Rolfe*, "how the annexation of a trust to the gift can make any difference. If it be lawful so to give the property out and out to the party for his own use, I cannot see that it makes any difference, that with it he is to pay for a particular thing. If a man on his death-bed gives another 1,000*l.*, is it any addition to the evils attending this mode of bestowing property, that he attaches a condition to it; as, for instance, that he stipulates, that his brother shall receive an outfit to India? The case of *Blount v. Burrow* is expressly in point, and disposes of the question; and I have no doubt that other cases might be found." These decisions rightly follow the civil law, according to which it is clear, that a *donatio mortis causâ* might be made the subject of a trust or condition (*a*).

Dominion must be parted with.—Even if there be a delivery to the donee or to some one for him, it will not be good, unless the donor (subject of course to the ordinary condition making void the gift, which is always either expressed or implied in case of his recovery) *parts with the dominion* over the thing given. Thus, in *Hawkins v. Blewitt* (*b*), in an action of trover for a box containing money and wearing apparel, by an administrator, the case on the part of the plaintiff was, that the intestate in his last illness ordered the box to be carried to the house of the defendant, who was his aunt, and to be delivered to her; but he gave no other directions respecting it, nor said anything about giving it to her. It was, however, further given in evidence, that on the next day, the key was brought to the intestate, who desired it to be taken back, saying that he should want some articles of clothing out of it. The plaintiff had a verdict. Lord *Kenyon*, C.J., said, "In the case of a *donatio mortis causâ*, possession must be immediately given; that has been done here: a delivery has taken place, but it is also necessary that by *parting with the possession, the deceased should also part with the dominion over it*. That has not been done here. The bringing back the key by her the next morning to the intestate, and his declaration that he should want one of the articles of his apparel contained in it are sufficient to show that he had no intention of making any gift or

(*a*) Dig. lib. 31, tit. 1, l. 77, s. 1, 27, but see *Bibby v. Coulter*, Ridg. cited 4 Russ. 27, 2 Coll. Ch. R. 356; Cas. t. H. 206 n. Cod. lib. 6, tit. 42, l. 9, cited 4 Russ. (*b*) 2 Esp. 663.

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disposition of the box. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself" (a).

In *Taylor v. T.* (b), T. in his last illness showed a deposit note to his daughter, the plaintiff, and told her in effect it was to belong to her in the event of his death. The plaintiff took the note, and by her father's directions put it in a cash-box for safe custody. The cash-box was kept in the father's bedroom, but she had the key. Held, a good *donatio mortis causâ* (c).

Where the legal title does not pass by delivery.—A delivery of a thing by way of symbol, according to the opinion of Lord *Hardwicke* in the principal case, is not a sufficient delivery. Thus, he held that the delivery of the receipts for South Sea Stock was not a sufficient delivery to constitute a *donatio mortis causâ*, but he said that an actual transfer, or something amounting to that, would have been necessary (d). The same conclusion has been arrived at with regard to scrip certificates of railway stock (e). And it has been held that the delivery of the book of a depositor in a savings-bank, is not a sufficient delivery to constitute a donation of the money deposited (f). Nor will the delivery of a note not payable to the bearer (g); nor in general of a cheque (h) upon a banker (i).

But in the recent case of *Re Dillon* (k) in the Court of Appeal, the Lords Justices *Cotton* and *Lindley* pointed out that there may be a good *donatio mortis causâ* where the instrument does not pass the legal property by delivery, for an equitable right is thereby created and the executors or administrators will be held trustees for the donee for the purpose of giving effect to the gift (l). That in the case of a *donatio mortis causâ* the Court will interfere to make the gift complete, although it would not do so in the case of a *donatio inter vivos* (m).

(a) See also *Reddel v. Dobree*, 10 Si. 244; *Tapley v. Kent*, 1 Robert. 400; *Warriner v. Rogers*, 16 Eq. 340.

(b) 56 L. J. Ch. 597.

(c) Cf. *Bunn v. Markham*, supra, p. 406.

(d) Supra, p. 405; but see *Re Dillon*, 44 C. D. 76, 82, and 83; and *Moore v. Darton*, 4 De G. & Sm. 517.

(e) *Moore v. M.*, 18 Eq. 474.

(f) *McGonnell v. Murray*, 3 Ir. R. Eq. 460.

(g) *Miller v. M.*, 3 P. W. 356.

(h) See infra, p. 411.

(i) *Tate v. Hilbert*, 2 V. jun. 111; *Rolls v. Pearce*, 5 C. D. 730; *Hewitt v. Kaye*, 6 Eq. 198; *Beak v. B.*, 13 Eq. 489; *Bromley v. Brunton*, 6 Eq. 275.

(k) 44 C. D. 76, 82, 83.

(l) And cf. *Duffield v. Elwes*, infra, p. 412.

(m) See *Ellisson v. E.*, post.

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In *Re Meul* (a) a testator who held a banker's deposit note for 3,700*l.*, in his last illness, two days before his death, expressed a wish to give 500*l.*, part of the amount, to his wife. At his request a friend filled up a seven days' notice to the bank to withdraw the deposit and the testator signed it; the friend then took the notice to the bank. The testator afterwards signed a form of cheque, which was on the back of the note, "Pay self or bearer 500*l.*;" the note was then handed to the wife. The testator died before the expiration of the seven days' notice. The practice of the bank was, when a customer withdrew part of a sum, which he had placed on deposit, to give him a fresh note for the balance. It was held that there had not been a valid *donatio mortis causa* of the 500*l.*, inasmuch as the donor did not intend to give the deposit note but only to give by means of a cheque part of the money deposited (b).

In *Re Dillon* (c) a testator who held a banker's deposit note, not transferable, for 580*l.* in his last illness shortly before his death took out the note and filled in and signed upon a stamp a form of cheque indorsed on the note, "Pay self or bearer 580*l.* and interest." He then handed the paper to E. D., who was a relation attending him, saying, "Now you understand if I get well you'll give it me back; and if not it will be all right." Held by C.A. that the gift was valid, for assuming the gift of the cheque to be invalid, yet the intention was to give the deposit note as well as the cheque.

In *Lawson v. L.* (d) A., during his last illness, drew a bill upon a goldsmith for the payment of 100*l.* to his wife, with a written indorsement that the money was "to buy her mourning," and A. delivered the note to his wife, it was held that she was entitled to the money. And Lord *Rosslyn*, in *Tate v. Hilbert* (e), considered the case perfectly well decided. "For," he observed, "taking the whole bill together, it is an appointment of the money in the banker's hands to the extent of 100*l.*, for the particular purpose expressed in a written appointment; which is a purpose that necessarily supposes his death."

In *Jones v. Selby* (f) it was held by *Trevor*, M.R., that the delivery of the key of a trunk, with words of gift of the trunk and its contents, was a good delivery of a tally upon Government for 500*l.* contained in the trunk. Lord *Hardwicke* observes, that the transaction

(a) 15 C. D. 651.

(b) Per *Cotton*, L.J., *Re Dillon*, *Duffin v. D.*, 44 C. D., p. 82; *Cain v. Moon*, 40 Sol. Jo. 300.

(c) 44 U. D., p. 76.

(d) 1 P. W. 41.

(e) 2 V. jun. 111, 2 R. R., p. 183.

(f) Pr. Ch. 300.

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"amounted to the same thing as a delivery of possession of the tally, provided it was in the trunk at the time."

In *Boutts v. Ellis* (a), a person four days before his death said to his wife: "I am a dying man, you will want money before my affairs are wound up." On the following day he signed and delivered to her a crossed cheque upon his bankers for 1000*l.*, and on the next day but one, remembering that the cheque was crossed, he asked a friend who visited him to take it and give the wife another for it; which the friend did, but his cheque was post-dated. The donor's cheque was paid before his death to his friend, who, after that event, gave to the widow a cheque not post-dated for the other. It was held by the Lords Justices, affirming the decision of Sir J. Romilly, M.R. (b), that the transaction constituted a good *donatio mortis causâ*.

3. What may be the Subject of a *Donatio mortis causâ*.

The following note must be read subject to the expressions of opinion made by the Lords Justices Cotton and Lindley, in their judgments in *Re Dillon* (c). Cotton, L.J., there stated that *Duffield v. Elwes* (d), shews that there may be a good *donatio mortis causâ* of an instrument which does not pass by delivery, and that the Court will aid the equitable title by making the executors or administrators of the deceased do everything necessary to complete the gift to the donee, and Lindley, L.J., said that the statement of the existing law that a man could not make a *donatio mortis causâ* of his own cheque might some day require consideration.

Negotiable instruments which are commonly treated as money for other purposes pass as donations (e).

There may be a *donatio mortis causâ* of a bond (f), though not of a mere simple contract debt, nor by the delivery of a mere symbol (g), but *quære*, whether having regard to *Moore v. Darton* (h), and to *Re Dillon*, supra, the delivery of any documents which are essential to the proof of the loan or debt would not be a sufficient delivery (i). So,

(a) 4 De G. M. & G. 249.

(b) Reported 17 B. 121.

(c) 44 C. D. 76, and supra, p. 408; and see *Porter v. Walsh*, (1895) Ir. R., p. 287.

(d) 1 Bli. (N. S.) 497, infra, p. 412.

(e) *Ranklin v. Weguelin*, 27 B. 309; *Veal v. V.*, ib. 303; *Byles*, (1891) p. 201.

(f) *Snellgrove v. Baily*, 3 Atk. 214; *Ridg. Cas. t. H.* 202.

(g) Per *Leach*, V.-C., in *Gardner v. Parker*, 3 Madd. 185; *Blount v. Burrow*, 4 Bro. Ch. 71; *Hirst v. Beach*, 4 Madd. 351, 356; *Clavering v. Yorke*, 2 Coll. Ch. R. 363, n.

(h) 4 De G. & Sm. 517.

(i) See *Duffield v. Elwes*, p. 412 infra.

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likewise, of bank notes (*a*); of a deposit-note given by a bank to the donor (*b*), and although the receipt is expressed to be not transferable (*c*), or although the depositor is required by the bank to sign a cheque indorsed on the note (*d*), and whether it be endorsed or not (*e*); and it seems, also, of all other notes, or bills payable to the bearer (*f*), or to order, though not endorsed by the donor (*g*).

A cheque (*h*) payable to the donor or order, and given by him during his last illness to the donee, is on the same footing as a bill of exchange or promissory note payable to the donor or order, and will pass to the donee as a *donatio mortis causá*, though unendorsed by the donor (*i*). "In Byles on Bills (*k*) it is stated that a cheque drawn by the donor upon his own banker, cannot be the subject of a *donatio mortis causá* because the death of the drawer is a revocation of the banker's authority to pay." But when the owner is dealing with the cheque of another man it stands on entirely the same footing as a bill of exchange or promissory note, which according to *Veal v. V.* (*l*), may well be the subject of a *donatio mortis causá*.

Seem, that since the case of *Re Dillon* above referred to, it may be held that although the banker's authority to pay is revoked by the death of the donor, yet if the donation be established, the legal personal representative of the donee would be required to give effect to the equitable title in the donee.

The delivery of a bond is still sufficient as a *donatio mortis causá* of the debt for which it is a security, although an action may, in certain cases, be maintained at law without profert of the bond (*m*).

So likewise a policy of insurance on the life of the donor will pass by delivery as a *donatio mortis causá* (*n*).

(*a*) *Miller v. M.*, 3 P. W. 356; *Shanley v. Harvey*, 2 Ed. Rep. 125; *Ashton v. Dawson*, Sel. Ca. 14.

(*b*) *Witt v. Amis*, 1 B. & S. 109; *Moore v. M.*, 18 Eq. 474; *Dunne v. Boyd*, 8 Ir. R. Eq. 609; *Taylor v. T.*, 56 L. J. Ch. 597; *Re Farman*, 58 L. T. 12; *Cain v. Moon*, 40 Sol. Jo. 300.

(*c*) *Cassidy v. Belfast B. Co.*, 22 L. R. Ir. 68; *Duffin v. D.*, 62 L. T. R. 615; *Re Dillon*, *infra*.

(*d*) *Re Dillon*, 44 C. D. 76; *Re Mead*, 15 C. D. 651.

(*e*) *Porter v. Walsh*, (1895) 1 Ir. R. 286.

(*f*) *Miller v. M.*, 3 P. W. 356; *Hill v. Chapman*, 2 Bro. Ch. 612; and see

Jones v. Selby, 1 Tr. Ch. 300; *Bibby v. Coulter*, Ridg. Cas. t. H. 206, n.

(*g*) *Ranklin v. Weguelin*, 27 B. 309; *Veal v. V.*, *ib.* 303; *Porter v. Walsh*, *infra*.

(*h*) See the remarks of *Lindley, L.J.*, in *Re Dillon*, *supra*, p. 410.

(*i*) *Re Mead*, 15 C. D. 651; *Clement v. Cheesman*, 27 C. D. 631; following *Veal v. V.*, 27 B. 303; *Porter v. Walsh*, (1895) 1 L. R. 284, *affir.* (1896) 1 L. R. 118.

(*k*) (1891) p. 200.

(*l*) 27 B. 303.

(*m*) *Duffield v. Elwes*, *infra*.

(*n*) *Witt v. Amis*, 1 B. & S. 109; *Amis v. Witt*, 33 B. 619.

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A delivery of the mortgage deeds of real estate will constitute a valid *donatio mortis causâ*. In *Duffield v. Elves* (a), a man, in contemplation of speedily approaching death, wishing to make a larger provision for his daughter than he had done by will, delivered, or caused to be delivered to her, certain deeds, which consisted of, (1.) A conveyance in fee of lands to secure 2,927*l.*, with the usual covenant for payment of the money lent, and a bond, by way of collateral security. (2.) An assignment of a mortgage debt of 30,000*l.*, and of a judgment for that sum recovered on a bond, with the conveyance of the land, and the usual covenant for the payment of the money. It was held by the House of Lords, reversing the decision of *Leach*, V.-C. (b), that there was a good *donatio mortis causâ*, and that the daughter was entitled to the benefit of the securities. "It," said Lord Eldon, "the delivery of a bond would, as it is admitted—(notwithstanding any change in the doctrine about profert)—if the delivery of a bond would give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is, whether, the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question, to which an answer is to be given: What are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other the judgment, which is to be considered on the same ground as a specialty, is delivered; with that, *the evidences of the debts* are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, whether regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only? * * The opinion which I have formed is, that this is a good *donatio mortis causâ*, raising by operation of law a trust; a trust which, being raised by operation of law, is not within the Statute of Frauds, but a trust which a court of equity will execute (c)."

The delivery by a creditor to the debtor or his agent of that which

(a) 1 Bli. (N. S.) 497; Porter v. Walsh, (1895) 1 L. R. 284; (1896) 1 L. R. 148 (C. A.).

(b) 1 S. & S. 239.

(c) See also Meredith v. Watson, 17 Jur. 1063; *Re Patterson*, 12 W. R. 941; *Re Dillon*, supra, p. 409.

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is essential to the recovery of the debt is, it seems, sufficient. Thus, in *Moore v. Darton* (a), where, upon a loan, the borrower had given the lender a receipt in the following form: "Received of Miss Darton 500*l.*, to bear interest at 4*l.* per cent. per annum," it was held by *Knight Bruce, V.-C.*, that a delivery of the receipt to an agent of the borrower by the creditor on her death-bed stating that she wished the debt to be cancelled, was a good *donatio mortis causâ*.

4. Evidence.

The evidence to establish a *donatio mortis causa* should be clear and satisfactory, especially in those cases where the relation between the donor and donee is such as to give rise to suspicion that undue influence may have been used, as in the case of an alleged donation from a client to his solicitor (b), or from a person *in extremis* to a priest attending him to administer the last offices of religion (c).

There is no absolute rule of the Court that a gift of this kind may not be established by the evidence of the claimant alone (d). For the law does not require corroboration; the law is, that when an attempt is made to charge a dead person's estate, the evidence ought to be looked at with great care and thoroughly sifted, and the mind of the Judge who hears it ought to be first of all in a state of suspicion; but if, in the end, the tribunal is satisfied, that is sufficient (e).

(a) 4 De G. & Sm. 517, cited by *Cotton, L.J.*, in *Re Dillon*, *supra*.

(b) *Walsh v. Studdart*, 4 D. & W. 159.

(c) *Thompson v. Heffernan*, *ib.* 285.

(d) *McGonnell v. Murray*, 3 Ir. R. Eq. 465; *Hayslep v. Gymer*, 1 A. & E. 162.

(e) See judgment of *Esher, M.R.*, in *Re Garnett*, 31 C. D., p. 9; and of Sir *J. Hannen* in *Re Hodgson*, 31 C. D., p. 183; *Wills on Evidence*, 1894, p. 242; *Re Farman*, 58 L. T. 12; *Re Dillon*, 44 C. D., p. 80; and cf. *McGonnell v. Murray*, 3 Ir. R. Eq. 465; *Tate v. Hilbert*, 2 R. R., p. 180.

ELECTION.

NOYS *v.* MORDAUNT.1706. 2 Vern. 581 (*a*).

Election.

A. having two daughters, B. and C., devises fee-simple lands to B., and lands which were settled upon him in tail to C. If B. will claim a share of the entailed lands under the settlement, she must quit the fee-simple lands; for the testator having disposed of the whole of his estate amongst his children, what he gave them was upon the implied condition they should release to each other.

JOHN EVERARD, having two daughters, in 1686 makes his will, and devises to Margaret, his eldest daughter, his lands in Beeston, and 800*l.* in money. to Mary, his second daughter, his lands in Stanborn and Broom, and 1,300*l.* in money, provided and on condition she released, conveyed, and assured Beeston lands to her sister Margaret; and devised to his said second daughter 1,300*l.* in money (*b*). Provided, if he should have a son, what was devised to his daughters to be void; and in such case gave to Margaret 1,200*l.*, and to Mary 1,000*l.* Provided, if he should have another daughter, then he gave the 800*l.* devised to Margaret to such after-born daughter; and the lands at Stanborn and Broom, and the 1,300*l.* devised to Mary, the second daughter, to the said Mary and such after-born daughter, equally between them.

He shortly afterwards died, and left his wife enceinte of a daughter, Elizabeth. Mary married Higgs, and died without issue, not having given any release to Margaret, her sister, according to the will.

(*a*) S. C., Eq. Ca. Abr. 273, pl. 3; money seems to be a repetition of the first bequest of that sum with the Prec. Ch. 265; Gilb. Eq. Rep. 2.

(*b*) This last bequest of 1,300*l.* in lands in Stanborn and Broom.

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Elizabeth claimed not only the lands devised to her by the will, and a moiety of what was devised to her sister Mary, but also a moiety of the Beeston lands, devised to Margaret: the same, on the testator's marriage, being settled on himself for life, and his wife for her jointure, and to the first and other sons, and, in default of issue male, to the heirs of his body.

Question was, whether she should be at liberty so to do, or ought not to acquiesce in the will, or renounce any benefit thereby.

LORD KEEPER COWPER.—In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee-simple lands, and to another lands entailed or under settlement (*a*), it is upon an *implied condition* that each party acquit and release the other; especially as in this case, where, plainly, he had the distribution of his whole estate under his consideration, and has given much more to Elizabeth than what belonged to her by the settlement, and had it in his power to cut off the entail.

(*a*) That is to say, entailed or settled lands are given, or upon such one upon the one to whom the fee-simple jointly with the other.

STREATFIELD *v.* STREATFIELD.

1735. Cas. t. Talbot, 176.

Election.

The ancestor, by articles previous to his marriage, agrees to settle certain lands to the use of himself and his intended wife, remainder to the issue of the marriage in the usual manner. After marriage he makes a deed, not pursuant to the articles, and has a son and two daughters; and upon the marriage of his son, settles other lands, in consideration of this last marriage, in the usual manner, and levies a fine of the former lands to the use of himself in fee; and then makes his will, and devises part of the former lands to his two daughters, and the rest of his real estate to trustees, to the use of his grandson for life, with usual remainders: and with direction, out of the profits to educate the grandson, and to place out the rest of the profits to be paid to the grandson at twenty-one years of age; and if he does not attain that age, to be paid to his said daughters, their executors, &c. The grandson is not to be bound by the deed, which did not pursue the articles, but then he shall make his election when he comes of age, and if he chooses to take lands which ought to have been settled, the daughters (his aunts) shall be reprimed out of the lands devised to him.

THOMAS STREATFIELD, the plaintiff's grandfather, by articles previous to his marriage, May 31st, 1677, agreed to settle lands in Sevenoake [in the county of Kent] to the use of himself and Martha, his intended wife, for their lives and the life of the survivor; and after the survivor's decease, to the use of the heirs of the body of him the said Thomas on his wife begotten, with other remainders over.

The marriage soon after took effect, and by deed, dated April 5th, 1698, reciting the foresaid articles, he settled his lands at Sevenoake to the use of himself and his wife for their lives, and the life of the longest liver of them, without impeachment of waste during the life of Thomas, and after their decease, to the use of the heirs of the body of the said Thomas, on the said Martha to be begotten; and for want of such issue, remainder to the right heirs of Thomas. They had

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issue, Thomas (their only son), and two daughters, Margaret and Martha.

In the year 1716, upon the marriage of Thomas, the son, the father settled other lands (of which he was seised in fee), of the yearly value of 355*l.*, to the use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with a power to raise 2,000*l.* for younger children.

After the son's death [leaving a son called Thomas], Thomas, the father, in the year 1723, levied a fine of the lands comprised in the deed of 1698 to the use of himself in fee, and in the year 1725 made his will, and thereby devised part of those lands (a) to his two daughters, Margaret and Martha; "And also all other his manors, messuages, lands, tenements, and hereditaments whatsoever, either in possession, reversion, or remainder, not theretofore given or disposed of, situate in the counties of Kent, Surrey, or elsewhere, to trustees in trust for the plaintiff Thomas, his grandson, for life; remainder to his first and other sons in tail male; remainder to his daughters in tail; remainder to Margaret and Martha, with several remainders over." Then comes this clause: "And my will and meaning farther is, and I do hereby authorise and appoint the trustees, and the survivor of them, to receive the rents and profits of the said estates to them devised, and out of the same to allow and expend, for the education of my grandson Thomas, so much as they shall think fit during his minority; and that the trustees shall place out at interest such monies arising out of the rents and profits of the said estates; which said monies, with interest arising therefrom, my will is be paid to my grandson Thomas at his age of twenty-one years, if he so long live; or, in case he dies before that age, then that the same shall be paid to my two daughters, Margaret and Martha, their executors, &c."

The testator died in the year 1730.

The question was, whether the settlement in 1698 was a proper execution of the articles of 1677? and if not, whether the general devise to the plaintiff should be taken as a satisfaction for what he was entitled to under the articles of 1677?

Mr. *Solicitor-General*, Mr. *Browne*, Mr. *Fazakerley*, and Mr. *Noel* argued for the plaintiff.

(a) *I.e.*, viz. the lands at Sevenoake in Kent.

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Mr. Attorney-General, Mr. Strange, and Mr. Peere Williams argued for the defendant.

LORD CHANCELLOR TALBOT.—It cannot be doubted but that, upon application to this Court for the carrying into execution the articles of 1677, the Court would have decreed it to be done in the strictest manner, and would never leave it in the husband's power to defeat and annul everything he had been doing; and the nature of the provision is strong enough for this purpose, without any express words, and I must, therefore, consider what was the operation of the deed of 1698, which is declared to be in performance of the true intent and meaning of the articles. If it be so, all is well; but if it be not, it only shows that the parties intended it so, but were mistaken. So was the case of *West v. Errissey* (a), where the articles were, by the House of Lords, decreed to be made good; and the same must be done in this case, if nothing intervenes to prevent it.

The settlement in 1716, whereby the grandfather settled other lands upon his son's marriage, has been called a satisfaction for those articles; but to me it appears neither an actual satisfaction nor to have been intended as such. The grandfather had done that in 1698, which he apprehended to be a satisfaction for the articles; but this deed proceeds upon considerations quite different from those of the articles, the persons claiming under this being purchasers for a consideration entirely new, the limitations being entirely different; and, therefore, it would be absurd to call this a satisfaction for another thing it hath nothing to do with, and to which it is no way relative.

The next thing to be considered is, the fine levied of the lands in question in the year 1723, by the grandfather; the intent whereof was to have the absolute ownership of those lands in him. And one reason why no application hath been made till now to have those articles carried into execution, might be that during the grandfather's life nobody was entitled to anything in possession under them.

Then comes the will in 1725, whereby he gives part of those lands, settled in 1698, to his daughters; thereby showing his apprehension to be, that, by a fine, he had given himself a power of disposing of

(a) 2 P. W. 349; 1 Bro. P. C. 225, Toml. edit.

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them; and it would be a very strained construction to say that he intended this, not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles.

The next thing is the devise to the trustees for his grandson, the plaintiff, upon his attaining the age of twenty-one; and the question here is whether the general words shall ever pass lands not capable of the limitation in the will? And to that have been cited *Rose and Bartlett's case* (a), and other cases; but they cannot influence the present case: for the testator had legally a power to dispose of those lands; and though they might be affected with a trust in equity, yet that cannot be supposed to lie in his conscience, he having done an act to enable himself to dispose of these lands. And it differs from the case that was put of an express trust, and the trustee devises *all his lands*; for there the trustee cannot be ignorant that the lands which he holds in trust are not his own. But what makes his intent clear is, that he hath devised part of these lands to his daughters, and he must have looked upon himself as master of the one part as well as the other; I, therefore, *think his intent was clear to pass these lands by the will*; and if so, we must now consider what will be the effect of this will.

If the plaintiff has a lien upon the lands of the articles, then he may stand to them if he pleases; *but when a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely but not partially under it: as was done in Noys and Mordaunt's case* (b); *there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made.* So are the several cases that have been decreed upon the custom of London.

The only difficulty in the present case is, that what is given to the plaintiff is precarious, nothing being given to him if he dies before twenty-one, and, if after, then but an estate for life; and that he appears before the Court in a favourable light of being heir-at-law, but this will not alter the case. The estates which the testator has given him were undoubtedly in his power; he hath given them to

(a) Cro. Car. 292.

(b) 2 Vern. 581.

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trustees until his grandson attain twenty-one, and has disposed of them in such a manner as that there can never be any undisposed residue to go to the plaintiff as heir-at-law; and surely it is as much in the power of the Court to make this bequest, thus limited to be a satisfaction, if the party will stand to the will, as in the other cases. Indeed, if he takes by the will, there is nothing to make satisfaction to his sisters for their general chance under the articles; but that is because nothing is left them by the will; and they cannot be said to be quite destitute of provision, since it is just and reasonable that they should be maintained by their mother, who is entitled to a large and ample provision by her marriage settlement: nor can what is devised to the plaintiff be looked upon as intended by the testator to go towards the maintenance of younger children; for, if the plaintiff dies before twenty-one, then all the profits already received are to go to his aunts; and so by that construction I must take the maintenance out of their estate, and oblige them to contribute to the maintenance of distant relations, viz., nieces, at the same time that the mother (who hath an ample provision) would be left at large, and under no tie of maintaining her own children.

And so decreed (*a*) the plaintiff to have six months after he comes of age, to make his election, whether he will stand to the will or the articles. And if he makes his election to stand to the latter, then so much of the other lands devised to him as will amount to the value of the lands comprised in the articles, and which were devised to Margaret and Martha, to be conveyed to them in fee.

NOTES.

1. Election generally.
2. Election in cases of deeds, p. 431.
3. Election in cases of wills, &c., p. 433.
4. Election in appointments under powers, p. 436.
5. Compulsory election, p. 439.
6. Voluntary election, p. 440.
7. Election by parties under disabilities, p. 442.
8. Death of person to elect without electing, p. 445.

1. Election generally.

Election is the obligation imposed upon a party by courts of equity

(*a*) See the decree, 1 Swans. 447; Reg. Lib. B. 1735, fol. 205.

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to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both (*a*). The principle is stated thus in Jarman on Wills (*b*): "That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument" (*c*). The principle of the doctrine of election is now well settled. It is founded on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it (*d*), but this presumption may be rebutted (*e*). It is applicable to every species of instrument, whether deed or will (*f*), and it applies to every kind of property—immediate, remote, contingent, real or personal (*g*); also to the interest of next of kin in the unascertained residue of an intestate's personal estate (*h*).

To illustrate the doctrine of election, suppose A., by will or deed, gives to B. property belonging to C. and by the same instrument gives other property belonging to himself to C., a court of equity will hold C. to be entitled to the gift made to him by A. only, upon the implied condition of his conforming with all the provisions of the instrument, by renouncing the right to his own property in favour of B.; he must, consequently, make his choice, or, as it is technically termed, he is put to his election, to take either under or against the instrument; if C. elects to take under, and consequently to conform with all the provisions of, the instrument, no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by

(*a*) Story (1892), 732; Dillon v. Parker, 1 Swans. 394, note (*b*); Thellusson v. Woodford, 13 V. 220, 9 R. R. 175.

(*b*) (1893), p. 415.

(*c*) See Walpole v. Conway, Barn. C. 159; Kirkham v. Smith, 1 V. 258; Macnamara v. Jones, 1 Bro. Ch. 411; Frank v. Standish, 1 Bro. Ch. 588, n.; Blake v. Bunbury, 4 Bro. Ch. 21; Swan v. Holmes, 19 B. 471; Wintour v. Clifton, 21 B. 447, 8 De G. M. & G. 641; Cosby v. Ashtown, 10 Ir. Ch. R. 219; Fleazle v. Fitzmaurice, 13 Ir. Ch. R. 481; Schroder v. S., Kay,

584, 585.

(*d*) Hamilton v. H., (1892) 1 Ch. p. 399.

(*e*) *Re Vardon's Trusts*, 31 C. D., p. 279; *Re Wells*, 42 C. D., p. 658; Hamilton v. H., *supra*.

(*f*) Lord Redesdale, in *Birmingham v. Kirwan*, 2 Sch. & L. 444, 450.

(*g*) *Wilson v. Townshend*, 2 V. jun. 693, 3 R. R. 31; *Webb v. Shaftesbury*, 7 V. 480, 6 R. R. 154; *Morgan v. M.*, 4 Ir. Ch. R. 606; *Sadlier v. Butler*, 1 Ir. R. Eq. 415.

(*h*) *Cooper v. C.*, 7 H. L. 53; *Bennett v. Houldsworth*, 6 C. D. 671.

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A.; but if C. elects to take against the instrument, that is to say, retains his own property and at the same time sets up a claim to the property given to him by A., an important question formerly arose whether he thereupon incurs a forfeiture of the whole of the benefit conferred upon him by the instrument, or is merely bound to make compensation out of it to the person who is disappointed by his election.

Compensation.—The principal case of *Streatfield v. S.* is a distinct authority for the doctrine of *compensation*, which may now be considered as fully established (*a*), and it may now be laid down in accordance with Mr. Swanston's learned note to *Gretton v. Howard* (*b*), "1st. That, in the event of election to take against the instrument, Courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints. 2nd. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right" (*c*). The compensation is a charge upon the benefits received under the instrument (*d*). If the election is not against but under the will the doctrine of compensation does not apply (*e*).

And after the death of a person who has elected to take against an instrument, compensation will be directed to be made out of his estate to the party who has sustained a loss thereby, so far as such loss does not exceed the benefit taken under the instrument by the person making such election (*f*), and such party may now commence an action for damages or compensation (*g*).

(*a*) *Webster v. Milford*, 2 Eq. Ca. Abr. 363, marg.; *Bor v. B.*, 3 Bro. P. C., Toml. edit. 167; *Ardesoife v. Bennett*, 2 Dick. 465; *Lewis v. King*, 2 Bro. Ch. 600; *Freke v. Barrington*, 3 Bro. Ch. 284; *Whistler v. Webster*, 2 V. jun. 372, 2 R. R. 260; *Ward v. Baugh*, 4 V. 627, 4 R. R. 307; *Cavan v. Pulteney*, 2 V. jun. 360, 3 R. R. 8; *Blake v. Bunbury*, 1 V. jun. 523, 1 R. R. 111; *Welby v. W.*, 2 V. & B. 190, 191; *Dashwood v. Peyton*, 18 V. 49, 11 R. R. 145; *Tibbitts v. T.*, Jac. 316; *Rancliffe v. Parkyns*, 6 Dow, 179.

(*b*) 1 Swans. 433, approved in *Ker v. Wauchope*, 1 Bl. 25.

(*c*) See also *Paulbury v. Clark*, 2 Mac. & G. 298; *Greenwood v. Penny*,

12 B. 403; *Howells v. Jenkins*, 1 De G. J. & S. 617; *Grissell v. Swinhoe*, 7 Eq. 291; *Pickersgill v. Rodger*, 5 C. D. 163; *Schroder v. S.*, Kay, 378; *Howells v. Jenkins*, 1 De G. J. & S. 617; *Cooper v. C.*, 7 L. R., H. L. 53.

(*d*) *Pickersgill v. Rodger*, 5 C. D. 163.

(*e*) *Re Chesham*, 31 C. D. 466. See *Forms, Judgments, Seton* (1893), p. 1339.

(*f*) *Rogers v. Jones*, 3 C. D. 688, 690; *Fyche v. F.*, 19 L. T. (N. S.) 343; *Pickersgill v. Rodger*, 5 C. D. 163; 2 *Seton* (1893), p. 1341.

(*g*) *Rogers v. Jones*, 7 C. D. 345.

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Moreover, where a person who elects to take a fund against an instrument has been previously receiving money under it, he must on making his election repay such money, and the persons interested under the trusts of the instrument have a lien for the repayment thereof on the fund which he elects to take (a).

As the doctrine of election depends upon compensation, it follows that it will not be applicable when made contrary to the instrument unless there be a *free and disposable fund* passing thereby from which compensation can be made. Thus it was held, in *Bristow v. Wardle* (b), that where, under a power to appoint to children, the father made an appointment to persons not objects of the power, any child might set it aside and claim as in default of appointment, and also take a specific share appointed to him. "The doctrine of election," said *Loughborough, C.*, "never can be applied, but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of, to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that which he had power to distribute" (c).

Upon the same principle in the case of a married woman, to whom an interest with a restraint on anticipation is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the nature of her interest in the property, to be relinquished by way of commutation, has by the terms of the instrument been made inalienable (d). In *Hamilton v. H.* (e), on the marriage of a lady in 1879, she being an infant the settlement (ante-nuptial) contained a covenant to settle after-acquired property, and gave her certain interests, some without power of anticipation. She was divorced, and brought an action to avoid the covenant. She married again before trial, and her second husband was made co-plaintiff. Held, that if she elected against the settle-

(a) *Codrington v. Lindsay*, 8 Ch. 378; *Codrington v. C.*, 7 L. R., II. L. 854; *Carter v. Silber*, (1891) 3 Ch. 553; S. C., reversed on other grounds, (1893) A. C. 360; *Hamilton v. H.*, (1892) 1 Ch. 396.

(b) 2 V. jun. 336, 2 B. R. 235.

(c) See also *Box v. Barrett*, 3 Eq. 244; *Pickersgill v. Rodger*, 5 C. D.

163; *Re Fowler's Trusts*, 27 B. 342; and as to heirlooms, *Re Chesham*, 31 C. D. 466.

(d) *Smith v. Lucas*, 18 C. D. 531; followed in *Wilder v. Pigott*, 22 C. D. 263; *Cahill v. C.*, 8 App. Cas. 420; *Re Wheatley*, 27 C. D. 613; *Re Vardon's Trusts*, 31 C. D. 275.

(e) (1892) 1 Ch. 396.

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ment she must give up the interests as to which she was not restrained to compensate the persons disappointed by such election, but that she could not give up the interests subject to restraint. Held also, following *Codrington v. C.* (a), that the date of the action to repudiate was not the date of her election, but that she was still entitled to exercise that right, within a time to be limited, but that if she elected to take against it she must account for all that she had received since the date of the decree *nisi*.

A person will not be obliged to elect between benefits conferred upon him by an instrument, and an interest which he takes derivatively from another, who has elected to take in opposition to the instrument. Thus it was held, that a husband might be tenant by the curtesy of an estate tail, which his wife had elected to take in opposition to a will, under which he had accepted benefits: for as the wife made complete compensation to the persons disappointed by her election, there could not be a second election, because in fact there was no one entitled to compensation (b).

Nor will a person be compelled to elect between a benefit conferred upon him by an instrument, and an interest which he took adversely to the instrument and derivatively from the real owner, who took no benefit thereunder. Thus, if one co-heiress by electing to take under a will is compelled to give up her original share, she may retain a share which since the testator's death has descended to her from a deceased co-heiress (c).

If however the title to property, whether derivative or otherwise, were vested in the owner before the testator's death, the owner must elect between benefits conferred upon him by the testator's will and his own property if the testator has devised it to others (d).

It seems to be doubtful whether the doctrine of election applies to grants from the Crown, for the Crown is always in existence and can always be applied to, to set right the grant (e).

Where, however, two persons A. and B. joined in a petition to the Crown, representing an estate to have escheated, and procured a grant of it to be made to them, it was held that the assignees of A. could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest (f).

(a) *Supra*.

(b) *Cavan v. Pulteney*, 2 V. jun. 544, 3 R. R. 8, 3 V. 384.

(c) *Cooper v. C.*, 7 L. R., H. L. 53; *Howells v. Jenkins*, 2 John. & H. 706; *Grissell v. Swinhoe*, 7 Eq. 291.

(d) See *Cooper v. C.*, *supra*; *Brodie*

v. Barry, 2 V. & B. 127; *Bennett v. Houldsworth*, 6 C. D. 671.

(e) Per *Plumer*, M.R., 2 J. & W. 345.

(f) *Cumming v. Forrester*, 2 J. & W. 344.

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In order to raise a case of election, at any rate in the case of a will, there must appear in the will itself a clear intention on the part of the testator to dispose of that which is not his own (*a*): and it is immaterial whether he knew the property not to be his own, or by mistake conceived it to be his own; for, in either case, if the *intention to dispose* of it appears clearly, his disposition will be sufficient to raise a case of election (*b*).

And it is likewise immaterial that a party put to his election by a will, after the date thereof puts into settlement property belonging to himself, which the testator affects to dispose of by his will. Thus in *Middleton v. Windross* (*c*) a testator gave all his property equally among his three daughters, Sarah, Margaret, and Jane, and directed Jane within twelve months after attaining twenty-one, to bring into hotchpot an estate to which she was entitled under the will of her grandfather. On Jane's marriage, subsequently to the date of the will, she, at the instance and under the superintendence of her father, settled the estate upon herself and her husband successively for life, with remainder to the children of the marriage. Afterwards, by the testator's advice, the estate was sold by the trustees for 3,000*l.* In a suit to administer the testator's estate, it was held that the 3,000*l.*, less the costs of the sale, ought to be brought into account in respect of Jane's share.

Moreover, though part of the benefits proposed by a testator to be conferred upon another may fail, what remains will be sufficient to constitute a case for election (*d*).

The mere recital in a will that a party is entitled to certain property, but not declaring the intention of the testator to give it to him, will not be sufficient to raise a case of election (*e*). So in *Box v.*

(*a*) *Forrester v. Cotton*, 1 Eden, 531; *Judd v. Pratt*, 13 V. 168, 13 V. 390; *Dashwood v. Peyton*, 18 V. 27; *Blake v. Bunbury*, 4 Bro. Ch. 21, 1 R. R. 111; *Rancliffe v. Parkyns*, 6 Dow, 149, 179; *Dillon v. Parker*, 1 Swans. 359; *Jervoise v. J.*, 17 B. 566; *Paulbury v. Clark*, 2 Mac. & G. 298; *Lee v. Egremont*, 5 De G. & Sm. 348; *Wintour v. Clifton*, 21 B. 447, 8 De G. M. & G. 641; and *Stephens v. S.*, 3 Drew. 697, 1 De G. & J. 62; *Poole v. Olding*, 10 W. R. 591; *Fox v. Charlton*, 10 W. R. 506; *Thornton v. T.*, 11 Ir. Ch. R. 474; *Box v. Barrett*, 3 L. R., Eq. 244; *Sadlier v. Butler*, 1 Ir. Eq. 415.

(*b*) *Whistler v. Webster*, 2 V. jun. 370, 2 R. R. 260; *Thellusson v. Woodford*, 13 V. 221, 9 R. R. 175; *Welby v. W.*, 2 V. & B. 199; overruling *Cull v. Showell*, Amb. 727; *Whitley v. W.*, 31 B. 173; *Coutts v. Ackworth*, 9 Eq. 519; *Griffith-Boscawen v. Scott*, 26 C. D. 358; *Re Booker*, W. N. (1886), 18.

(*c*) 16 Eq. 212.

(*d*) *Newman v. N.*, 1 Bro. Ch. 186.

(*e*) *Dashwood v. Peyton*, 18 V. 41; *Forrester v. Cotton*, 1 Eden, 522, 535; *Blake v. Bunbury*, 1 V. jun. 514, 523, 1 R. R. 111.

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Barrett (a), under a settlement the four daughters of a testator took equal shares subject to his life interest. The testator, by his will, recited that under the settlement his two daughters, *Ellen and Emily*, would become entitled to certain hereditaments, and that in making his will he had taken that into consideration, and had not devised them so large a share under his will, as he would have done had they not been so entitled. He then devised to his daughters, *Ellen and Emily*, certain estates, and to his other daughters, *Edith and Eliza*, certain other estates of much larger value. *The will did not purport to dispose of or affect the settled estates*. It was held by *Romilly, M.R.*, that as the will did not purport to make any disposition of the settled estates, and was only made under a mistaken impression, *Edith and Eliza* were not put to their election (*b*).

The difficulty of sustaining a case of election is always much greater where the testator has a partial interest in the property dealt with, than where he purports to devise an estate in which he has no interest at all (*c*). For if the testator has some interest, the Court will lean as far as possible to a construction which would make him deal only with that to which he is entitled (*d*); and if a testator entitled to a share of a house or lands devised his interest or property therein, it is clear that he only intended his own interest therein to pass (*e*).

Where, however, a testator entitled only to part of an estate uses words in devising it which show clearly that he intended to pass the entirety, if the owner of the other part takes other benefits by the will, he will be put to his election; as for instance where a person entitled only to a moiety of a house devises it as "all my messuage, now on lease to A and in his occupation" (*f*), especially if there are also directions to repair the property specifically devised (*g*), or if the testator in another part of the will correctly described a moiety, when it was his intention to give a moiety (*h*). And where the wife of a devisee alone was entitled to a particular property, a devise of it as "my interest in the A. property," will put the wife to her elec-

(a) 3 Eq. 244.

(b) See also *Langslow v. L.*, 21 B. 552; *Blacket v. Lamb*, 14 B. 482; *Banks v. B.*, 17 B. 352; *Re Fowler's Trust*, 27 B. 362.

(c) *Randcliffe v. Parkyns*, 6 Dow, 185; *Henry v. H.*, 6 Ir. R. Eq. 286.

(d) *Maddison v. Chapman*, 1 John. & H. 470; *Re Bidwell's Settlement*, 11 W. R. 161.

(e) *Henry v. H.*, 6 Ir. R. Eq. 286.

(f) *Padbury v. Clark*, 2 Mac. & G. 298.

(g) *Ibid.*

(h) *Ibid.*

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tion (*a*). And a specific devise by a particular description may be considered a sufficient indication of an intention of a partial owner of property to pass the entirety thereof (*b*). So where a sum of 10,000*l.* Consols being in settlement in trust for two sisters for life, and after their deaths two-thirds of the capital were in trust for their brother, and one-third in trust for their two sisters; and the brother bequeathed "the whole of his property" to trustees as to part on certain trusts for his sisters, and he afterwards bequeathed the property "including the 10,000*l.* trust money" to other persons; it was held that the sisters must elect between the benefits given them by the will, and their interest in the 10,000*l.* Consols (*c*).

Where a testator is entitled only to a reversion in lands devised, the question sometimes arises whether he intended to include in the devise the immediate and absolute interest, or to confine it to his own estate only. *Prima facie*, doubtless the testator would be understood to refer only to what he had power to dispose of. He may, however show a contrary intention, if for instance he has devised the land in question upon limitations, which cannot or probably would not ever take effect, or has conferred powers on the devisees which they cannot or probably will not ever be able to exercise, the intention to include the immediate interest will be sufficiently indicated to raise a case of election (*d*). So too a direction that an annuity is to be paid to a person for life, out of lands of which the testator has only the reversion, sufficiently indicates an intention to dispose of the whole (*e*). But such indications of intention will not prevail against an express confirmation of the settlement creating the estates, which come before the testator's reversion (*f*). But a confirmation of a part of the settlement leaves the remainder unconfirmed (*g*).

A devise of an estate does not *per se* import an intention to devise it free from incumbrances to the devisee, so as to put the incumbrancers taking benefits under the will to their election (*h*).

(*a*) Whitley v. W., 31 B. 173; but see Read v. Crop, 1 Bro. Ch. 492; Wintour v. Clifton, 8 De G. M. & G. 644; Grosvenor v. Durston, 25 B. 97; Usticko v. Peters, 4 Kay & J. 437.

(*b*) Fitzsimons v. F., 28 B. 417; Howells v. Jenkins, 1 De G. J. & S. 617; Miller v. Thurgood, 33 B. 496; Wilkinson v. Dent, 6 Ch. 339; but see Chave v. C., 2 John. & H. 713, n.

(*c*) Swan v. Holmes, 19 B. 471.

(*d*) Welby v. W., 2 V. & B. 187,

198; Wintour v. Clifton, 8 De G. M. & G. 641.

(*e*) Usticko v. Peters, 4 Kay & J. 437, 455.

(*f*) Raneliffe v. Parkyns, 6 Dow, 149.

(*g*) Blake v. Bunbury, 1 V. jun. 514.

(*h*) Stephens v. S., 1 De G. & J. 62; 3 Drew. 697; Henry v. H., 6 Ir. R. Eq. 286; Maddison v. Chapman, 1 John. & H. 470.

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The intention to do so must appear conclusively from the words of the will, as for instance, if the testator repudiates the instrument creating the charge, and the dispositions of the will are inconsistent with that instrument, it will show that he intended the property to pass free from the charge (*a*). So if a testator entitled to an estate, subject to an incumbrance, secured by a long term, devise such estate for a term to take effect *immediately* upon the death of the testator, and for the *immediate* purpose of raising money for the payment of annuities and legacies, the incumbrancers deriving other interests under the will, if they take by it, must not disappoint it, but must permit the estate to go in the new channel free from incumbrances as the testator intended (*b*).

General Devise or Bequest.—A mere general devise will not comprehend property of which the deviser is not owner, although even before the Wills Act, at the date of his will and his death he had no property of his own to which the words were applicable (*c*). Nor will the fact that the devise is to uses in strict settlement extend general words to more than the testator's interest, though his devisable interest is only an estate *pour autre vie* (*d*).

Parol evidence, dehors the will, is not admissible for the purpose of showing that a testator considering property to be his own, which did not actually belong to him, intended to comprise it in a general devise or bequest (*e*). But in *Pickersgill v. Rodger* (*f*), *Jessel, M.R.*, said: "The presumption in the absence of evidence to the contrary is that the testator by his will intends merely to devise or bequeath that which belongs to him . . . it is only a presumption which may be rebutted even by parol evidence, and it may be rebutted by evidence shewing that under a misapprehension of law, testator believed that property which did not belong to him did belong to him."

Where a testator holds property with another in joint tenancy,

(*a*) *Sadlier v. Butler*, 1 Ir. R. Eq. 413, 423. 523; *Stratton v. Best*, 1 V. jun. 285; *Rutter v. Maclean*, 4 V. 537; *Pole v. Somers*, 6 V. 322; *Druce v. Denison*, 6 V. 402; *Doe v. Chichester*, 4 Dow, 76, 89, 90; *Clementson v. Gandy*, 1 Keen, 309; *Dixon v. Sampson*, 2 Y. & C. C. C. 566; overruling *Pulteney v. Darlington*, 2 V. jun. 544, 3 V. 384.

(*b*) *Blake v. Bunbury*, 1 V. jun. 514, 523.

(*c*) *Read v. Crop*, 1 Bro. Ch. 402; *Jervoise v. J.*, 17 B. 566; *Thornton v. T.*, 11 Ir. Ch. 474; *Timewell v. Perkins*, 2 Atk. 102.

(*d*) *Cosby v. Ashtown*, 10 Ir. Ch. R. 219, 226, 231.

(*e*) *Blake v. Bunbury*, 1 V. jun.

(*f*) 5 C. D. 170.

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since on his death without severance the whole will go to the surviving joint-tenant, it will not pass by a general bequest in the testator's will to a third party so as to raise a case of election against the surviving joint-tenant taking other benefits by the will. Thus, where a testator both before and after making his will, transferred certain Government stock unto the names of himself and his wife and by his will made a general bequest of all his funded property, or estate of whatsoever kind to trustees for his wife for her life, and after her decease as therein mentioned, it was held that the will did not purport to dispose of the stock in terms sufficiently clear and distinct, or to put the wife upon her election (*a*); for in order to raise a case of election in such a case the stock in question must be specifically and clearly referred to (*b*).

But a testator may in his will itself show an intention under a general devise to dispose of lands which are not absolutely his own, as for instance by describing them as being in the occupation of himself or his tenants (*c*). So if a testator devise land in a particular locality, if there is any property of the testator answering the description it will be confined to that (*d*).

Exclusion of Election.—The rule of election, the subject of this note, which depends, as before observed, upon an implied condition, will not be excluded by the parties being expressly put to their election, as between the benefits conferred upon them, and sums due to them from the person conferring such benefits. Thus in *Wilkinson v. Dent* (*e*) a testatrix devised "all and singular the estate and mines of Aroa" to trustees in trust for sale, and gave to T. D. 10,000*l.*, which was to be taken in full satisfaction of any sums which she might owe him at her decease, and to W. D. 3,000*l.*, which she declared was to be taken in satisfaction of any rent-charge out of a certain part of her real estate. Her will contained the usual devise of trust and mortgage estates. She was in possession of the entirety of the Aroa estate, but was owner only of one moiety, being in possession of

(*a*) *Dummer v. Pitcher*, 2 My. & K. 262; *Blonmart v. Player*, 2 S. & S. 567; *Crabb v. C.*, 1 My. & K. 511; *Smith v. Lyne*, 2 Y. & C. C. C. 345; *Allen v. Anderson*, 5 Ha. 163; *Seaman v. Woods*, 24 B. 372; and see *Poole v. Adling*, 10 W. R. 337.

(*b*) *Coates v. Stevens*, 1 Y. & O. Ex. 66; *Grosvenor v. Durston*, 25 B. 97;

Shuttleworth v. Greaves, 4 My. & C. 38; *A.-G. v. Fletcher*, 5 L. J. (N. S.) Ch. 75.

(*c*) See *Honywood v. Forster*, 30 B. 14.

(*d*) *Raneliffe v. Parkyns*, 6 Dow. 149; *Maddison v. Chapman*, 1 John. & H. 470.

(*e*) 6 Ch. 339.

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the other moiety by virtue of a mortgage, the money due upon which was subject to trusts, under which T. D. and W. D. on her death became entitled, each to one fifth. It was held, that T. D. and W. D. were put to their election between the benefits they took under the will, and their shares in the mortgage money. "The question," said *James, L.J.*, "is, whether there is testamentary bounty to persons whose estates and rights are, under another part of the will, interfered with. It appears to me clear, that this question must be answered in the affirmative, though, before the amount of the bounty can be ascertained, the amount of the claims which the legatees had against the testatrix must be ascertained" (a).

But the ordinary doctrine of election may be excluded by an apparent expression of intention by a testator that only one of the gifts, to an object of his bounty, is conditional on his giving up what a testator purports to take away from him. For instance, if a testator had an eldest son, owner of a bit of property, and it would be convenient that this bit of property should go along with a property which the testator is devising to his second son. So, the testator devises this bit of property to the second son; and amongst other gifts to his eldest son, he gives him a piece of property which he states in his will to be in lieu of his bit of property which the testator purported to take away from him. In such case, the eldest son would merely be put to his choice between those two bits of property (b).

Dower and Free Bench.—A widow might be put to her election both at law and in equity between her dower and benefits given her by her husband's will, but since the Dower Act (c) and the Wills Act (d), the cases upon the subject have become of slight practical importance, and the reader is referred to the last edition of this work; to Jarman on Wills (1893), p. 429; and to Shelford's Statutes (1893), p. 347. The statute does not apply to free bench, but if a man surrendered his copyhold estate to the use of his wife and then devised it the widow did not take free bench (e); and now, under section 3 of the Wills Act (f), a devise without surrender has the same effect (g).

(a) See also *Coutts v. Acworth*, 9 Eq. 519, and consider *Syngue v. S.*, 9 Ch. 128.

(b) *East v. Cook*, 2 V. 30, explained in *Wilkinson v. Dent*, *supra*. See also *Bor v. B.*, 3 Bro. P. C. Toml. edit. 167; *Fytche v. F.*, 19 L. T. 343; *Coote v. Gordon*, 11 Ir. R. Eq. 180;

and see *Brown v. Parry*, cited Jarman on Wills (1893), p. 434.

(c) 3 & 4 Will. 4, c. 105.

(d) 1 Vict. c. 26.

(e) *Lacey v. Hill*, 19 Eq. 350.

(f) 1 Vict. c. 26.

(g) *Ibid.*, but see *Thompson v. Burra*, 16 Eq. 592; *Powdrell v. Jones*, 2 Sm.

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Creditors.—The doctrine of election is not applicable to creditors. Thus, if before the time when real estate was made assets for payment of debts a testator devised land in payment thereof and bequeathed in favour of other persons funds, then assets for payment of debts, it was held that the creditors were not put to their election, and might assert their rights against such funds, without giving up their claim under the devise to the land (a). In *Dey v. D.* (b), where a father devised his own estate and an estate of his son's for the payment of debts, the son was allowed as a creditor of his father to share with the other creditors in the benefit conferred upon them by the provision for payment of debts, without being obliged to give up his own estate. But these questions will not arise often now, as real estates are liable to the payment of debts by simple contract as well as specialty (c).

2. Election in Cases of Deeds.

The question of election principally arises in "cases of wills, because deeds being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration expressed requires" (d). The election is that of a different kind to that of wills (e), for there need not be in the case of deeds a clear intention on the part of the settlor or others to dispose of property which was not his own. The principle upon which cases of election are raised in deeds being that which Lord *Redesdale* in *Birmingham v. Kirwan* (f) states to be the general foundation of the law of election, viz., that a person cannot "approbate and reprobate" under the same instrument. Thus if a person comes in directly under a settlement, and asks to have the benefit of such of its provisions as give him an advantage, and at the same time claims adversely to what was intended to be the rest of the settlement, because it was not binding, then a case of election arises. In *Brown v. B.* (g) marriage articles executed when a lady was a minor contained a covenant by the husband to settle her interest

& G. 407; *Riddell v. Jenner*, 10 Bing. 29; *Doo v. Gwinnell*, 1 Q. B. 682; none of which cases were referred to in *Lacey v. Hill*.

(a) *Kidney v. Coussmaker*, 12 V. 136, 2 R. R. 118; *Cooper v. C.*, 7 L. R., II. L., p. 66; *Clark v. Guise*, 2 V. 617.

(b) 2 P. W. 412, 418.

(c) See 3 & 4 Will. 4, c. 104.

(d) Per Lord *Redesdale*, in *Birmingham v. Kirwan*, 2 Sch. & L. 444, cited by Lord *Hatherley* in *Codrington v. C.*, 7 L. R., II. L., p. 867.

(e) As to which see *infra*, p. 433.

(f) 2 Sch. & L. 444, 448.

(g) 2 L. J. 181.

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in real and personal estate, including after-acquired property, on the usual trusts; and she died without having confirmed the articles, leaving her husband surviving, and an only child, her heiress-at-law, who claimed an interest under the articles in the personal estate and also claimed the real estate attempted to be settled as heiress-at-law of her mother. It was held, that the heiress-at-law was put to her election. "In the present case," said *Romally*, M.R., "the plaintiff comes in and claims directly under the limitation of the personal estate for her benefit under the settlement and claims the real estate adversely to the settlement on the ground that in the event the settlement did not bind it. I think, therefore, that she claims beneficially under the settlement directly, and that consequently she must elect whether she will take adversely to it or under it; if the latter, she must give effect to the whole of it as far as she can" (a).

With regard to marriage settlements, *James*, L.J., laid down this simple rule in *Codrington v. Lindsay* (b): "The only safe rule to guide the Court is to consider everything that is brought or expressed to be brought into settlement by anybody from any source as one aggregate trust fund. So considering it, it seems to me very easy and very right to read all the trusts thus: out of the aggregate property settled A. is to have so much and no more, B. so much and no more, the issue to have such interests and no more or other. Then if by paramount title A. or B. or any of the issue takes out of the aggregate something other than the share expressed to be given, he or she must take that in full satisfaction of the expressed share or interest," and he more than doubted the propriety of *Campbell v. Ingilby* (c), which was the only exception he thought to this rule. In that case the heir-at-law of an infant claimed property as not being bound by a settlement made by the infant, and it was held that if he had no benefit and claimed none under the settlement, he might assert his right, there being no case of election (d); and in *Brown v. B.* (e) he was held entitled to do this, though it may be, from extraneous circumstances, and by some separate and independent cause, he had obtained some benefit under the settlement.

For the application of the principle of approbation and reprobation

(a) See *Anderson v. Abbott*, 23 B. H. L. 854.

457; *Willoughby v. Middleton*, 8 Ch.

590; *Codrington v. C.*, 7 L. R., 11. L.

854; *Griffith-Boscawen v. Scott*, 26 C.

D. 358; *Hamilton v. H.*, *supra*, p. 423.

(b) 8 Ch., p. 592; affirmed 7 L. R.,

(c) 1 De G. & J. 393.

(d) *Campbell v. Ingilby*, 1 De G. & J. 393; but see this case quoted 8 Ch. 593.

(e) 2 Eq. 485.

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to voluntary deeds, see *Llewellyn v. Mackworth* (a); *Anderson v. Abbott* (b); to cases of contract for valuable consideration resting in articles, see *Savill v. S.* (c), *Brown v. B.* (d); to contracts for value completely executed by conveyance and assignments, see *Bigland v. Huddleston* (e); *Chetwynd v. Fleetwood* (f), *Green v. G.* (g); *Bacon v. Cosby* (h); *Mosley v. Ward* (i); *Willoughby v. Middleton* (k).

3. Election in Cases of Wills.

Where by the same will several gifts are given, some beneficial others onerous, but all of them the property of the testator, in the absence of the intention of the testator to make the acceptance of the burden a condition of the benefit (l) the devisee may take what is beneficial and reject what is onerous (m). But where the question arises upon a single and undivided gift, such gift is *prima facie* evidence that it was the testator's intention that the gift should be one, and that it was the testator's intention that the legatee should either take it all or take none of it (n).

But even in such a case the Court might sometimes be able to discover some subtle indication of an intention that the legatee should be at liberty to take part of the gift and leave the rest (o). In *Syer v. Gladstone* (p) a freehold house and the furniture therein were left to A. and B. for life. The house was mortgaged for more than its value; A. and B. were held entitled to use the furniture, without keeping down the interest on the mortgage, see *Re Hutchings* (q).

In contradistinction to the decisions last noticed, the rule as to election, properly so called, is to be confined to a gift under a will, and a claim dehors the will, and adverse to it, and is not to be applied

(a) Barn. C. 445.

(b) 23 B. 457.

(c) 2 Coll. Ch. R. 721.

(d) Supra.

(e) 3 Bro. Ch. 285, n.

(f) 4 Bro. P. C. 435, edit. 1784.

(g) 2 Mer. 86.

(h) 4 De G. & Sm. 261.

(i) 29 B. 407.

(k) 2 John. & H. 344; not followed in *Re Vardon's Trusts*, 31 C. D. 275.(l) *Talbot v. Radnor*, 3 My. & K. 252; *Green v. Britten*, 42 L. J. Ch. 187; *Fairclough v. Johnstone*, 16 Ir. Ch. 442; *Warren v. Rudall*, 1 John.

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& H. 13; and see *Long v. Kent*, 13 W. R. 961.(m) *Andrew v. Trinity Hall*, 9 V. 525; *Moffett v. Bates*, 3 Sm. & G. 468; *Warren v. Rudall*, 1 John. & H. 1; *Aston v. Wood*, 22 W. R. 893.(n) *Guthrie v. Walrond*, 22 C. D. 573, 577; *Green v. Britten*, 42 L. J. Ch. 187.(o) Per Fry, J., in *Guthrie v. Walrond*, 22 C. D. 577.

(p) 30 C. D. 611.

(q) 32 C. D., p. 419, where *Guthrie v. Walrond*, and *Syer v. Gladstone*, are explained by *Lindley, L.J.*, and distinguished.

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as between one clause in a will and another clause in the same will as in the case of deeds (a).

Although, under the old law, a devise to the heir was in a certain sense inoperative, as he took by *descent* as heir, and not by purchase as devisee, it has been held, ever since the decision of *Noys v. Mordaunt*, supra, p. 415, to be a sufficient gift to him of the testator's property to raise a case of election, should the testator devise or bequeath to another, property belonging to the heir (b); *à fortiori* will the heir now be put to his election, since, by the Act for the Amendment of the Law of Inheritance (c), where lands are devised by the will of a testator dying after the 31st of December, 1833, to the heir, he will take as devisee by purchase, and not by descent (d). Parties disappointed by the election of the heir to take against a will by requiring the executors to complete a contract for an estate entered into by the testator, have no lien on the estate for the amount of the benefit the heir has taken under the will, but after his death they may prove against his estate for the amount which he has so received (e).

No case of election will be raised where there is a want of capacity to devise real estate by reason of infancy. Thus, under the old law, where an infant, whose will was valid as to personal, but invalid as to real estate, gave a legacy to his heir-at-law, and devised real estate to another person, the heir-at-law would not have been obliged to elect between the legacy and the real estate, which descended to him in consequence of the invalidity of the devise; he might take both (f).

Nor will a case of election be raised if there is a want of capacity to bequeath arising from coverture. Thus, where a *feme covert* made a valid appointment by will to her husband, under a power, and also bequeathed to another personal estate, to which the power did not extend, the husband was not put to his election, but was held to be entitled to the benefit conferred upon him by the power, and also to the property bequeathed by his wife, to which he was entitled *jure mariti* (g). But if the personal estate bequeathed by the wife had

(a) See *Wollaston v. King*, 8 Eq. 165; *Wallinger v. W.*, 9 Eq. 301; *Burton v. Newberry*, 1 C. D. 241; *Bizzey v. Flight*, 3 C. D. 269; *Warren v. Rudall*, 1 John. & H. 1.

(b) *Welby v. W.*, 2 V. & B. 190; *Anon.*, Gilb. 15; *Thellusson v. Woodford*, 13 V. 209.

(c) 3 & 4 Will. 4, c. 106.

(d) See *Schroder v. S.*, Kay, 578.

(e) *Greenwood v. Penny*, 12 B. 402.

(f) *Hearle v. Greenbank*, 1 V. 298. See now *Wills Act*, 1 Vict. c. 26, s. 7.

(g) *Rich v. Cockell*, 9 V. 339. See also *Blaiklock v. Grindle*, 7 Eq. 215.

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been her separate property, although no question of election would arise (because the wife had not attempted to dispose of the property of her husband), the legatee would have been entitled to his legacy.

Previous to the Wills Act (*a*), where a testator by a will, not properly attested for the devise of freeholds, but sufficient to pass personal estate, devised freehold estates away from his heir, and gave him a legacy, the question has arisen whether the heir-at-law was not obliged to elect between the freehold estate which descended to him in consequence of the devise being inoperative, and the legacy; it is clearly settled that he would not be obliged to elect (*b*); unless the legacy was given to him with an express condition, that if he disputed or did not comply with the whole of the will, he should forfeit all benefit under it (*c*). These questions will not arise under wills coming within the Wills Act (*d*), because if they are sufficiently attested for the bequest of a personal legacy, they will also pass freehold estates.

Previous to the Wills Act (*e*), a testator could not devise after-acquired lands, for although by his will he devised lands of which he should be seised at the time of his decease, they would descend to his heir (*f*). Where in such case a testator devised after-acquired lands away from his heir, which he nevertheless took by descent, he did so subject to the application of the doctrine of election: for the rule in such cases was, that *if the testator showed a clear intention of disposing of after-acquired estates*, the heir was obliged to elect between the after-acquired estates which would descend to him, and any benefits given him by the will (*g*).

But by 1 Vict. c. 26, s. 24, it is enacted, "That every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Previous to 55 Geo. 3, c. 192 (which rendered a surrender of copyholds to the use of wills unnecessary for the future), it was held, that the heir to whom copyholds descended, in

(*a*) 1 Vict. c. 26.

(*b*) *Shedden v. Goodrich*, 8 V. 481; *Gardiner v. Fell*, 1 J. & W. 22; *Wilson v. W.*, 1 De G. & Sm. 152; and see *Middlebrook v. Bromley*, 11 W. R. 712.

(*c*) *Boughton v. B.*, 2 V. 12; *Shedden v. Goodrich*, 8 V. 496; *Brodie v. Brady*, 2 V. & B. 130.

(*d*) 1 Vict. c. 26.

(*e*) *Ibid.*

(*f*) *Bunker v. Coke*, 1 Bro. P. C. 199.

(*g*) *Thellusson v. Woodford*, 13 V. 209; *Churchman v. Ireland*, 1 Russ. & M. 280; *Greenwood v. Penny*, 12 B. 403; *Schroder v. S.*, 24 L. J. (N. S.) Ch. 510; *Hance v. Truwhitt*, 2 John. & H. 216.

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consequence of their not having been surrendered to the use of a will, was obliged to elect between the copyholds and any benefit he may have taken under the will (*a*); but in *Judd v. Pratt* (*b*), the heir was *not* compelled to elect, because the testator, having freeholds as well as copyholds, was held *not* to have sufficiently indicated his intention to pass the copyholds by a mere general devise of all his real estate.

The heir of heritable property in Scotland, becoming entitled to it in consequence of the will by which it is devised to another not being conformable to the solemnities required by the law of Scotland, and taking also under the same will real or personal property in this country, will be compelled, if the intention to dispose of land in Scotland is clear, to elect between the heritable property which has descended to him as heir, and the benefits given to him by the will (*c*) as to land in St. Kitt's (*d*). But if the intention does not so appear, if for instance the devise is general, then *secus* (*e*).

4. Election in Appointments under Powers.

The doctrine of election is applicable to appointments under a power. Thus where an express appointment is made to a stranger to the power, which is therefore void, and a benefit is conferred by the same instrument upon a person entitled in default of appointment, the latter will be put to his election (*f*).

If the donee of a non-exclusive power of appointment among a class to whom this property is limited in default of appointment, appoints exclusively to one object, and by the same instrument confers benefits on the others, the latter will be put to their election. "Thus where a person has power to appoint to two, and he appoints to one only, and gives a legacy to the other, that is a case of election" (*g*). So where a testator having power under a settlement to

(*a*) *Unett v. Wilkes*, Amb. 430; *Rumbold v. R.*, 3 V. 65; *Pettward v. Prescott*, 7 V. 341.

(*b*) 13 V. 168; 15 V. 390.

(*c*) *Brodie v. Barry*, 2 V. & B. 127; *Orrell v. O.*, 6 Ch. 302; *Dewar v. Maitland*, 2 Eq. 834; *Baring v. Ashburton*, 54 L. T. 463.

(*d*) *McCall v. McC.*, 1 Dr. 283; *Harrison v. H.*, 8 Ch. 342.

(*e*) *Johnson v. Telfourd*, 1 Russ. & M. 214; *Allen v. Anderson*, 5 Ha.

163; *Maxwell v. M.*, 2 De G. M. & G. 705; *Lamb v. L.*, 5 W. R. 720; *Maxwell v. Hyslop*, 4 Eq. 407.

(*f*) Sug. Pow. 578, 8th edit.; *Whistler v. Webster*, 2 V. jun. 367, 2 R. R. 260; *Reid v. R.*, 25 B. 469; *Ex p. Bernard*, 6 Ir. Ch. R. 133; *Tomkyns v. Blane*, 28 B. 422; *Re Fowler*, 27 B. 362; *England v. Lavers*, 3 Eq. 63.

(*g*) Sug. Pow. 589, 8th edit.; *Wollen v. Tanner*, 5 V. 218; *Vane v. Dunganon*, 2 Sch. & L. 118.

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appoint the settled hereditaments to children of his first marriage only, appointed the settled hereditaments (describing them as his own property) in favour of a son of the first marriage, subject to a charge in favour of his other children, including the children of his second marriage, and he devised property of his own to the same son, subject to the same charges in favour of his other children "so as to equalize the shares of all his children in all his property," it was held by *Fry, J.*, that a case of election was raised in favour of the children of the second marriage (*a*).

Where the donee of a power makes a valid appointment to objects of the power, and by a subsequent instrument after the expiration or exhaustion of the power purports to revoke the former appointment re-appointing in favour of another object, and by the same instrument gives benefits to the former appointees, the latter will be put to their election (*b*). So where a person having a power to appoint, delegates the power (which he has really no right to do) to another, and by the same instrument confers benefits upon the objects of the power, they cannot retain the benefits given to them by the will and also claim the property against the execution of the power so improperly delegated (*c*).

The doctrine of election is also applicable where there is a revocation in excess of the power, and benefits are conferred upon the person disappointed by such revocation. Thus where an appointment was made of the interest of a fund to a person for life irrevocably, and after his decease the fund was appointed to others with power to the appointor, by deed or will, to revoke the appointments subsequent to the life interest, and the appointor afterwards, supposing he had complete dominion over the fund, revoked *all* the appointments before made, giving the person entitled to the interest of the fund for life part of it absolutely, and the remainder of the fund to others, the person to whom, under the first appointment, a life interest was given in the whole fund, was compelled to elect between the life interest in the whole fund, and his interest in part of the fund given to him absolutely, under the second appointment (*d*). And it was directed that the costs should be borne by each share in proportion. In other words, the taker of each share was to bear the proportion of the burthen falling to the share he took (*e*). In no instance, how-

(*a*) *White v. W.*, 22 C. D. 555; distinguishing *Carver v. Bowles*, 3 Russ. & M. 304, and *Woolridge v. W.*, 1 John. 63.

(*b*) See *Cooper v. C.*, 7 L. R., H. L. 53.

(*c*) *Ingram v. L.*, cited 1 V. 259.

(*d*) *Coutts v. Acworth*, 9 Eq. 519.

(*e*) *Ibid.*, 532.

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ever, has a case of election been raised where a testator gave no property absolutely his own to an object of the power out of which, in the event of his not acquiescing in an appointment by the donee to a person not an object of the power, the latter could be compensated (a).

Neither will the non-execution of the power upon an erroneous impression stated in the will that, by its non-execution one person who is a legatee will divide the fund, the subject of the power, equally with another, raised case of election (b).

No case of election arises between two appointments under limited powers. Thus in *Re Applin's Trust* (c), A. had power to appoint by will a fund to any one or more of his children. He had under a distinct instrument power to appoint another fund amongst his children, to any one of them, but not exclusively, and they were to take equally in default of appointment. He had five children. By his will he exercised the first power in favour of S., one of his children, and the second in favour of two others of his children. The second power was accordingly badly exercised, and S. took a share in default of appointment. It was held that no case of election was raised against S. (d).

Where moreover there is an attempt to execute a power in violation of the rules of law no question of election will arise. Thus where a person makes an appointment void for remoteness to a person not an object of this power, although by the same instrument he gives property of his own to the persons entitled in default of appointment, the latter will not be compelled to elect, for in such case the instrument must be read as if the invalid appointment were not in it at all (e).

So where a person appoints simply to objects of the power, and gives them property of his own, subsequently directing them to settle the property so appointed on persons not objects of the power, such direction will not raise a case of election; but, *secus*, where there is a clause of forfeiture of the legacies on non-compliance with such direction (f).

(a) *Re Fowler's Trusts*, 27 B. 362; *Armstrong v. Lynn*, 9 Ir. R. Eq. 186.

(b) *Langslow v. L.*, 21 B. 552.

(c) 13 W. R. 1062.

(d) See also *Re Fowler's Trusts*, 27 B. 362.

(e) *Wollaston v. King*, 8 Eq. 165,

175; *Re Warren's Trusts*, 26 C. D. 208, 219; but see judgment of Chitty, J., in *Re Wheatley*, 37 C. D., p. 611.

(f) *King v. K.*, 15 Ir. Ch. R. 479, overruling *Moriarty v. Martin*, 3 Ir. Ch. R. 26.

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Merely precatory words, requesting appointees, objects of the power, to leave the fund appointed to others, not objects of the power, will not raise a case of election (*a*).

In order to raise a case of election by the execution of a power there must be an absolute and direct appointment to strangers to the power. And it has been recently decided that where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the will must be read as if all the passages in which such attempts are made were swept out of it, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election (*b*).

5. Compulsory Election.

Election may be compulsory, as where a person is compelled to elect by a judgment of the Court. Persons compelled to elect are entitled previously to ascertain the relative value of their own property, and that conferred upon them, and time will be allowed to them for that purpose (*c*); and as to the apportionment of debts upon different funds, see *Cooper v. C.* (*d*). Probably a judgment with the necessary inquiries could now be obtained upon an originating summons under R. S. C. 1883, Order 55, r. 3 (*g*) (*e*).

An election made under a mistaken impression will not be binding, for in all cases of election the Court, while it enforces the rule of equity, that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts, performed, perhaps, in ignorance of the value of the funds (*f*).

(*a*) *Blacket v. Lamb*, 14 B. 482; *Kampf v. Jones*, 2 Keen, 756; *Carver v. Bowles*, 2 Russ. & M. 301.

(*b*) *Woolridge v. W.*, 1 John, 63; *Churchill v. C.*, 5 Eq. 44; *Roach v. Trood*, 3 C. D. 429; *Re Warren's Trusts*, 26 C. D. 208; but see judgment of *Fry, J.*, in *White v. W.*, 22 C. D., and of *Chitty, J.*, in *Re Wheatly*, *supra*.

(*c*) *Newman v. N.*, 1 Bro. Ch. 186; *Wake v. W.*, 3 Bro. Ch. 255; *Chalmers v. Storil*, 2 V. & B. 222; *Hen-*

der v. Rose, 3 P. W. 124, n.; *Whistler v. Webster*, 2 V. jun. 367; *Douglas v. D.*, 12 Eq. 617, 2 R. R. 260; *Codrington v. C.*, L. R. 7 H. L. 868; *Seton*, p. 1339.

(*d*) 6 Ch. 15.

(*e*) See *Davies v. D.*, 38 C. D., p. 212; *Re Roylo*, 43 C. D. 18.

(*f*) *Pusey v. Desbouverie*, 3 P. W. 315; *Boynton v. B.*, 1 Bro. Ch. 445; *Wake v. W.*, 3 Bro. Ch. 255; *Kidney v. Coussmaker*, 12 V. 136; *Dillon v. Parker*, 1 Swans. 381, and note.

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A person who does not elect within the time limited, will be considered as having elected to take *against* the instrument putting him to his election (*a*). In *Hamilton v. H.* (*b*) the judgment fixed the time (*c*).

Although before an heir can be put to his election he is entitled to know everything which concerns the situation and the value of the property in reference to which he may be required to make his election, there is no authority for the proposition that where an heir has chosen deliberately to confirm a devise of lands, which, without his confirmation, would be invalid, there must be, in order to enable the Court to hold that those claiming under him are bound by his confirmation, some distinct evidence of his knowledge of his rights (*d*).

6. Voluntary Election.

Election is either express (about which it is unnecessary to say anything) or implied. And here considerable difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election; and this question, it seems, must be determined more upon the circumstances of each particular case, than upon any general principle. There is generally an inquiry directed as to whom the premises (belonging to another), in the testator's will mentioned, belonged at his death, and if they belonged to A. (a person to whom he had given by will benefits), whether A. had elected in his lifetime to take under the testator's will (*e*). On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for if a party so situated, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other; and, in like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own,—as, for instance, by mortgaging it (particularly if this be done with the knowledge and concurrence of the party entitled to call for an election)—such dealing will be unavailable to prove an actual election as against the receipt of the rent of the other property (*f*).

(*a*) See the decree in *Streatfield v. S.*, 1 Swans. 447.

(*b*) (1892) 1 Ch. 396.

(*c*) *Ibid.*, p. 408.

(*d*) *Dewar v. Maitland*, 2 Eq. 838.

(*e*) *Peck v. P.*, Seton, p. 1340.

(*f*) *Padbury v. Clark*, 2 Mac. & G. 298; and see *Morgan v. M.*, 4 Ir. Ch. R. 606, 614; *Re Turner*, 66 L. T. 758.

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Any acts, to be binding upon a person, must be done with a full knowledge of his rights (*a*); also with the knowledge of the right to elect (*b*), and with the intention of electing (*c*).

It is difficult to lay down any rule as to what length of time, after acts done by which election is usually implied, will be binding upon a party, and prevent him from setting up the plea of ignorance of his rights. In *Wake v. W.* (*d*), it was held that three years' receipt of a legacy and annuity, under a will by a widow in ignorance of her rights, did not preclude her from making her election; in *Reynard v. Spence* (*e*), where a widow had received an annuity for five years, it was held, she had not elected (*f*). And in *Sopwith v. Maugham* (*g*), where a widow had for sixteen years enjoyed a provision under a will in ignorance of her right to dower, in express satisfaction of which the provision was made for her, she was held not to have elected. But where an infant made a voidable contract, but did not repudiate it until five years after, he was held bound (*h*).

But a person may by his unequivocal acts suffer specific enjoyment by others until it becomes inequitable to disturb it (*i*).

A sale of his own property, devised by the testator to others, will be considered an election to take against the will by a person taking a beneficial interest under the will (*k*) and election may be inferred from one (*l*) or a series of unequivocal acts (*m*). And acts of implied election which will bind a party will also bind his representatives (*n*). And some acts, which it appears would not be binding upon him if insisted upon in his lifetime, will bind his representatives "upon that

(*a*) *Wilson v. Thornbury*, 10 Ch. 248; *Re Davidson*, 11 C. D. 341.

(*b*) *Briscoe v. B.*, 7 Ir. Eq. R. 123; *Sweetman v. S.*, 2 Ir. Eq. 141.

(*c*) *Stratford v. Powell*, 1 Ball & B. 1; *Dillon v. Parker*, 1 Swans. 380, 387; *Edwards v. Morgan*, 1 Bli. (N. S.) 401; *Worthington v. Wiginton*, 20 B. 67; *Wintour v. Clifton*, 8 De G. M. & G. 641.

(*d*) 1 V. jun. 335.

(*e*) 4 B. 103.

(*f*) See also *Butricke v. Brodhurst*, 3 Bro. Ch. 90; *Dillon v. Parker*, 1 Swans. 386; *Fytche v. F.*, 7 Eq. 494.

(*g*) 30 B. 235.

(*h*) *Edwards v. Carter*, (1893) A. C. 360.

(*i*) *Tibbits v. T.*, 19 V. 663; *Dewar v. Maitland*, 2 Eq. 834; and see as to election implied by acting on a contract and taking the benefit of it, *Greenhill v. N. B. & Mercantile In. Co.*, (1893) 3 Ch. 474, and cases there cited.

(*k*) *Rogers v. Jones*, 3 C. D. 688.

(*l*) *Barrow v. B.*, 4 K. & J. 406; *Greenhill v. North British, &c., Co.*, (1893) 3 Ch. 474.

(*m*) *Spread v. Morgan*, 11 H. L. Cas. 588; *Briscoe v. B.*, 1 Jo. & Lat. 334; *Giddings v. G.*, 3 Russ. 241.

(*n*) *Northumberland v. Aylesford*, Amb. 540, 657; *Dewar v. Maitland*, *supra*; *Stratford v. Powell*, 1 Ball & B. 1; *Ardesoife v. Bennett*, 2 Dick. 463.

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principle only," as observed by Lord *Hardwicke*, "not to disturb things long acquiesced in in families, upon the foot of rights which those, in whose place they stand, never called in question" (*a*). But if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation, and place the other party in the same situation as if those benefits had not been accepted, they may renounce them and determine for themselves (*b*).

A person entitled in remainder to an interest in property is not bound by the election of a party having a prior interest (*c*), and every member of a class, moreover, as for instance, next of kin, has a distinct right to elect, and will not be bound by the election of the majority nor of the administrator (*d*).

Where an election was doubtful it has been sent to a jury to determine that fact (*e*). Where upon an inquiry it has been found that a deceased beneficiary under the will of a testator has elected to take under his will, there will be a declaration made by the Court, that the premises belonging to such beneficiary, in the testator's will mentioned, passed in equity to the devisee thereof, and that the heir-at-law or devisee of the beneficiary is a trustee thereof for the devisee under the will (*f*).

So where a defendant has elected to take estates appointed by the will of the testator, who has bequeathed to others the defendant's share of funds in settlement, the defendant will be directed to execute a proper release of his share and interest in the settlement to the trustees thereof, such release to be settled by the judge (*g*).

If no act is done affirming or disaffirming a voidable covenant it will be held binding (*h*).

7. Election by Parties under Disabilities.

Infants.—Where an infant is bound to elect, the period of

(*a*) *Tomkyns v. Ladbroke*, 2 V. 593; *Worthington v. Wiginton*, 20 B. 67; *Sopwith v. Maugham*, 30 B. 235, 239; *Whitley v. W.*, 31 B. 173.

(*b*) *Dillon v. Parker*, 1 Swans, 385; *Moore v. Butler*, 2 Sch. & L. 268; *Tyson v. Benyon*, 2 Bro. Ch. 5.

(*c*) *Ward v. Baugh*, 4 V. 643, 4 R. R. 307; *Hutchison v. Skelton*, 2 Macq. H. L. Cas. 492, 495.

(*d*) *Fytche v. F.*, 7 Eq. 494.

(*e*) *Roundell v. Curren*, 2 Bro. Ch. 73; 1 Swans, 383, n.

(*f*) See *Peck v. P.*, Seton, Form 5, p. 1340.

(*g*) *Fleming v. Buchanan*, Seton, p. 1342.

(*h*) *Burnaby v. Equitable, &c. Soc.*, 28 O. D. 416; cited with approval, *Re Hodson*, (1894) 2 Ch., p. 426; and see *Harris v. Watkins*, 2 Kay & J. 473; *Dewar v. Maitland*, 2 Eq. 834.

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election is, in some instances, as in *Streatfield v. S.*, deferred until after he comes of age (*a*). In *Edwards v. Carter* (*b*), a settlement was made in 1883 in contemplation of the intended marriage between S. and V. S. was an infant, and he did not come of age until a month after. The settlement contained a covenant to settle after-acquired property. This settlement, being voidable only and not void, might have been repudiated by him *within a reasonable time* after he attained his full age. He did not repudiate it until nearly five years afterwards. He was held bound (*c*). In other cases there has been a reference to inquire what would be most beneficial to the infant (*d*). And where the Court had sufficient materials before it an order has been made for an infant to elect without a reference to Chambers (*e*).

Married Women.—The practice as to election by married women in cases in which she is not restrained from anticipation, as to which see *supra*, p. 423 (*f*), varies (*g*); but in general there will be an inquiry what is most beneficial for them, and they will be required to elect within a limited time (*h*). But where the married woman has manifestly the better interest, the inquiry may be dispensed with (*i*).

An adult married woman may elect so as to affect her interest in real property without deed acknowledged; and where she has once so elected, the Court can order a conveyance accordingly; and the transaction will be enforced against the heir (*k*).

(*a*) *Boughton v. B.*, 2 V. 12; *Bor v. B.*, 3 Bro. P. C. 173, Toml. edit.

(*b*) (1893) A. C. 360, reported in C. A. as *Carter v. Silber*, (1892) 2 Ch. 278.

(*c*) See *Wilder v. Pigott*, 22 C. D. 267; *Re Hodson*, (1894) 2 Ch. 421; *Burnaby v. Equitable, &c. Soc.*, 28 C. D., p. 423; *Cooper v. C.*, 13 App. Cas. 88.

(*d*) *Gretton v. Haward*, 1 Swans. 413; *Brown v. B.*, 2 Eq. 481; *Seton v. Smith*, 11 Si. 59; *Seton* (1893), Form 2, p. 1339; Form 6, p. 1331.

(*e*) *Blunt v. Lack*, 26 L. J. Ch. 148; *Lamb v. L.*, 5 W. R. 772; *Seton* (1893), Form 3, p. 1339.

(*f*) And see *Hamilton v. H.*, (1892) 1 Ch. 396; *Smith v. Lucas*, 18 C. D. 531; *Re Vardon's Trusts*, 31 C. D. 275,

and *Robinson v. Wheelwright*, 6 De G. M. & G. 535, when it was held that the Court could not enable her to bind such an interest, but see the Conveyancing Act, 1881, sec. 39.

(*g*) See Mr. Swanston's note to *Gretton v. Haward*, 1 Swans. 413.

(*h*) *Cooper v. C.*, 7 L. R., H. L. 53, 67, 79; *Seton* (1893), (n.) to Form 2, p. 1339.

(*i*) *Wilson v. Townsend*, 2 V. 633, 3 R. R. 31; *Hamilton v. H.*, (1892) 1 Ch., p. 408.

(*k*) *Ardessoife v. Bennet*, 2 Dick. 463; *Barrow v. B.*, 4 Kay & J. 409; *Smith v. Lucas*, 18 C. D. 531; *Wilder v. Pigott*, 22 C. D. 263; *Re Vardon's Trusts*, 31 C. D. 275; *Re Hodson*, (1894) 2 Ch. 421, *infra*, p. 444.

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Ordinarily a married woman cannot elect to relinquish a reversionary chose in action which she has no power to dispose of (*a*).

A married woman, in the case of a reversionary interest in personalty, equally as in the case of real property where, under Malins' Act (*b*), she has power to dispose, in manner therein mentioned, of such reversionary interest, would not be allowed to avail herself of a fraud, and might therefore be held to have made her election even when such reversionary interest in personalty was thereby affected (*c*), and it was held by *Stirling, J.*, that the same principle applies in the case of a reversionary interest to which Malins' Act does not apply, as where her interest accrued prior to Dec. 31, 1857, if the case is one of an *ante-nuptial* contract (*d*). But otherwise if the contract is *post nuptial* (*e*). And see *Harle v. Jarman* (*f*), where *North, J.*, explains the distinction between affirming a voidable contract, such as that of an infant spinster made before marriage, and a void contract, such as that in *Seaton v. S.*, where the contract was after marriage and in respect of a reversionary interest not within Malins' Act, and also points out that in *Seaton v. S.* and *Smith v. Lucas* and other cases the question was not one of election proper between two gifts or interests, but only of affirming or repudiating an instrument.

In *Re Hodson* (*g*), an *ante-nuptial* settlement contained a covenant by the intended wife, a spinster and infant, to settle after-acquired property. It was not sanctioned under the Infants' Settlement Act. The marriage took place in 1879. In 1880 she ratified the settlement by deed, but it was not acknowledged under the Fines and Recoveries Act or Malins' Act. At the date of the settlement she had a contingent reversionary interest in a share of realty directed to be sold. In 1893 her husband died, and shortly after she became entitled in possession to this share of the proceeds of realty. Held, that the disability of coverture did not extend to a case of equitable election, that her voidable covenant had been confirmed, and that she was bound (*h*).

(*a*) *Whittle v. Henning*, 2 Ph. 731; *Williams v. Mayne*, 1 Ir. R. Eq. 519; Malins' Act, Shelford, R. P. St. (1893), p. 315.

(*b*) 20 & 21 Vict. c. 57.

(*c*) *Wilder v. Pigott*, 22 C. D. 263.

(*d*) *Greenhill v. N. B. & Mercantile*

In. Co., (1893) 3 Ch. 474; but see this case discussed in *Harle v. Jarman*, (1895) 2 Ch. 429.

(*e*) *Seaton v. S.*, 13 App. Cas. 61.

(*f*) (1895) 2 Ch. 429.

(*g*) (1894) 2 Ch. 421.

(*h*) Following *Wilder v. Pigott*.

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Lunatics, &c.—The right to elect to take under or against a will may, where a lunatic is so found, be exercised by his committee under the direction of the Court. Where not so found, as it cannot be exercised by himself, it may be by his representatives after his death (*a*).

If a married woman becomes of unsound mind before electing, though not found so by inquisition, the Court has jurisdiction to make an election for her if it appears to be for her benefit (*b*).

8. Death of Person to Elect without Electing.

If a person under an obligation to elect dies without having done so, and property which he takes beneficially under the will, and his own property bequeathed to strangers, go the same way; if, for instance, both be personal property vesting either in his legatees, or in the case of the intestacy of such person, in his next of kin; such persons would be entitled to elect (*c*). Each of the next of kin has a separate right of election, so that neither the election of the majority nor that of the heir or administrator binds the others, and those of the next of kin who elect to take under the will, will be entitled to all the beneficial interest by the will conferred on the intestate. But any of the next of kin electing to take against the will must not only give up all the benefits under it, but is bound to bring into account the interest of the person through whom he claims (*d*).

Where a person dies without having made any election between his own property (personalty bequeathed to legatees), and real estate which he took under the will, and which go different ways, viz., the former to the executors and the latter to his heir-at-law or devisee, there can be no election on the part either of the executor on the one hand, or the heir-at-law on the other hand; each will retain the property to which he is legally entitled; but the party taking the testator's own property, *i.e.*, in the case supposed, the realty, will be under an obligation to make good what is sufficient to satisfy the disappointed legatees, and the amount sufficient for that purpose will be a charge on the real estate (*e*).

As to election in cases of conversion, see *Fletcher v. Ashburner*, *supra*, p. 357.

(*a*) *Re Howson*, 23 L. J. Ch. 256; Pope, Lunacy (1890), 365.

(*b*) *Jones v. Lloyd*, 18 Eq. 265; *Wilder v. Pigott*, 22 C. D. 263.

(*c*) *Fytche v. F.*, 7 Eq. 490.

(*d*) *Fytche v. F.*, 7 Eq. 490; following *Ward v. Baugh*, 4 V. 623, 4 R. R. 307; *Rogers v. Jones*, 3 C. D. 688.

(*e*) *Pickersgill v. Rodger*, 5 C. D. 163, 175.

EQUITABLE ESTOPPEL.

BURROWES v. LOCK (a).

1803. 10 V. 470—476; 8 R. R. 33, 836.

Equitable Estoppel.

The representation by a trustee that the trust fund is unencumbered, knowingly made to a person about to advance money to the *cestui que trust*, estops the trustee from subsequently asserting the existence of a prior incumbrance to the prejudice of such person.

A trustee is thus compellable in equity to make such representation good to the person whom he has thus misled: although he alleges that the representation was made by himself in good faith, and in forgetfulness of the fact that he had previously received notice of an incumbrance affecting the trust fund.

THOMAS CARTWRIGHT, who died in 1787, by his will, made in 1778, gave his residuary estate to his executors, the defendant, James Lock, and two other persons, upon trust for his, the testator's, children equally. Part of the residuary estate consisted of a debt of 2,600*l.* due from Lord Dillon to the testator. The testator left nine children surviving him. The defendant Edward Cartwright, as one of such children, was entitled to 288*l.* 17*s.* 9*d.*, being his one-ninth of the 2,600*l.* By a deed of the 21st of November, 1801, Edward Cartwright, in consideration of 132*l.* assigned his 288*l.* 17*s.* 9*d.* to the plaintiff, who thereupon gave James Lock notice of the assignment. On the 20th of November, 1802, the 2,600*l.* was paid to Lock as the then surviving executor of the will; and he, having paid eight-ninths of it to the brothers and sisters of Edward Cartwright, retained the latter's one-ninth, *i.e.*, 288*l.* 17*s.* 9*d.* On the plaintiff applying to Lock for payment of that sum, the defendant, James Cartwright, a

(a) The statement of this case is taken from the record in the Registrar's book, as reported in *Low v. Bouverie*, (1891) 3 Ch. 82, p. 94.

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brother of Edward Cartwright, set up a claim to 10 per cent. of it under what appeared a deed of family arrangement, dated in 1790, whereby, amongst other things, it was agreed that Edward Cartwright's share of the 2,600*l.* should be subject to a deduction of 10 per cent. in favour of James Cartwright.

The bill of complaint, having stated the particulars of the assignment of the 21st of November, 1801, proceeded as follows:—

“ The plaintiff charges that, prior to the time of making the said assignment, application was made on the part of the plaintiff unto the defendant Lock, to know whether the defendant Edward Cartwright was absolutely entitled to the said one-ninth part of the said debt; and the defendants respectively, and particularly the defendant Lock, prior to the plaintiff's said purchase and assignment, did give the plaintiff an answer in the affirmative; and particularly the defendant Lock, prior to the said transaction, and in November, 1801, did write a letter to the plaintiff, to the effect following, viz.: ‘ SIR,—William Edward Cartwright is entitled to his share of money secured by debentures on Lord Dillon's estate, when sold to pay them off, which he can dispose of to any one.—I am, &c. JAS. LOCK; ’ and, upon the faith of the said letter from the defendant Lock, the plaintiff actually purchased the defendant Edward Cartwright's said one-ninth share of the said debt, without knowing that the other defendant, James Cartwright, had any right or deduction whatsoever out of the same; for, although the defendants respectively, and particularly the defendant Lock, before and at the time of the plaintiff's purchasing the defendant Edward Cartwright's said share in the said debt, had been apprised and did suspect that the defendant James Cartwright had a claim of a deduction of 10 per cent. out of the said defendant Edward Cartwright's said share, and had some notice relating thereto, yet they did not disclose the same to the plaintiff or give him the least notice thereof; and the plaintiff charges that he did *bonâ fide* pay the whole of the consideration money expressed in the said deed of assignment for the purchase of his one-ninth part of the said debt; and the plaintiff charges that the said deed of assignment is a valid deed on the part of the plaintiff; and in case the defendant James Cartwright is entitled to have any deduction out of the said share so assigned to the plaintiff as aforesaid, then the said defendants, and particularly the defendant Edward Cartwright in the first instance

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and in case of his default then the defendant Lock, ought to make good the same, and therefore that the said defendants might answer the several matters aforesaid; and that the said defendant James Lock might be decreed to pay and satisfy to the said plaintiff the said sum of 288*l.* 17*s.* 9*d.*, being the one-ninth part or share of the said sum of 2,600*l.* so purchased by and assigned to the plaintiff as aforesaid, together with interest and costs; and in case the defendant James Cartwright was entitled to and should be paid anything from and out of the said debt or money so assigned to the plaintiff as aforesaid, then that the defendants, and particularly the defendant Edward Cartwright in the first place, and, in default of payment by him, then that the defendant Lock might answer and make good the same with interest unto the plaintiff; and for relief in the scope of the said plaintiff's bill.

The defendant Edward Cartwright, by his answer submitted that, under the circumstances therein mentioned, the plaintiff ought not to be allowed to have the benefit of the assignment of the 21st of November, 1801, or to receive payment of Edward Cartwright's share of the 2,600*l.* The defendant, James Lock, by his answer, admitted having had notice from the plaintiff of the assignment of the 21st of November, 1801, and said he apprehended that the 288*l.* 17*s.* 9*d.* was subject to a deduction of 10 per cent. to James Cartwright. He submitted that, James Cartwright having made the claim, he, Lock, could not, as trustee, with safety to himself, pay over Edward Cartwright's share of the 2,600*l.* to the plaintiff, but expressed his willingness to act as the Court should think proper. The plaintiff's bill having been amended, the defendant Edward Cartwright put in an answer to it, admitting that James Cartwright claimed the 10 per cent.; and he stated that he believed that the plaintiff, previous to his purchase, did inquire of Lock as to whether he, Edward Cartwright, was absolutely entitled to his one-ninth, and that Lock wrote the letter above mentioned, though he, Edward Cartwright, did not know whether the plaintiff purchased the share without knowing that James Cartwright claimed any deduction out of it; but if the plaintiff did purchase without knowledge of the claim, he, Edward Cartwright, denied that the same was wilfully suppressed by him from the plaintiff; and he believed that, had the plaintiff asked Lock whether there was any incumbrance affecting his (Edward Cart

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wright's) share, which inquiry was not made, Lock would have given him every information; and that he, Edward Cartwright, did not think of mentioning it as it would naturally be discovered on an investigation of the title. The defendant James Lock, by his answer to the amended bill, admitted the plaintiff having made the inquiry of him, and that he did write the letter; he alleged, however, that he did not recollect ever having said that Edward Cartwright could dispose of his share free from any deduction, or that any such question was ever asked of him, but that the inquiry was whether Edward Cartwright could sell his share, to which his (Lock's) answer was that he could, and this, he submitted, was the import of his letter; and he altogether denied any wilful suppression, saying that, had the plaintiff asked him whether there was any incumbrance affecting Edward Cartwright's share, he would not have hesitated giving him any information in his power. He admitted having, before the plaintiff's purchase, heard of James Cartwright's claim, but alleged that, it being a matter in which he himself was not interested, he gave himself no concern about it, nor did it enter his mind during any of the times he saw the plaintiff or when he wrote the letter. He admitted that he did not disclose the matter to the plaintiff before the purchase, but said this was entirely accidental, and he submitted to act as the Court should direct. The defendant James Cartwright also put in an answer, claiming to be paid the 10 per cent. out of Edward Cartwright's share, and that his interest in such share could not be affected by any transaction that might have taken place between Edward Cartwright and the plaintiff.

The case having been argued and the letter from Lock to the plaintiff produced and put in evidence, a decree was pronounced, "that the defendant James Lock do pay to the plaintiff the sum of 288*l.* 17*s.* 9*d.*, being one-ninth part or share of the sum of 2,600*l.* purchased by the plaintiff of the defendant Edward Cartwright and assigned to him by the indenture of the 21st day of November, 1801, subject to a deduction of 10*l.* per cent. to the defendant James Cartwright; and it is ordered that the defendants Edward Cartwright and James Lock do jointly pay to the plaintiff the 10*l.* per cent. hereinbefore directed to be deducted out of the said 288*l.* 17*s.* 9*d.* and it is ordered that the plaintiff do pay unto the defendant James Cartwright his costs of this suit to be taxed," &c., and that "the costs

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which the plaintiff shall so pay unto the said James Cartwright be repaid to him by the defendant James Lock; and, as between the plaintiff and the said defendants, James Lock and Edward Cartwright, no costs on either side:” liberty to apply.

NOTES.

1. Generally.
2. Cases illustrating the doctrine of equitable estoppel, p. 454.
3. Infancy and coverture, p. 469.

1. Generally.

Equitable Estoppel—The principal case belongs to a class of cases not resting on contract (*a*) or agreement, but in which courts of equity have compelled persons to make good the representations concerning existing facts (*b*), on the faith of which they have induced others to act (*c*).

It is proposed to confine this note to the consideration of cases of the above description, which illustrate the rule of equitable estoppel, namely, that where one by his words or conduct induces another to take a representation as true, and to believe that he was intended to act upon it, and such other person does act upon it so as to alter his previous position, the person making such representation is concluded from averring against such other a different state of things as existing at the same time (*d*).

Kay, L.J., in *Low v. Bouverie* (*e*), states the result of the authorities thus:—

1. There has been from ancient times a jurisdiction in courts of equity in certain cases to enforce a personal demand against one who has made an untrue representation upon which he knew that

(*a*) Although this case comes “very near contract,” *Brownlie v. Campbell*, 5 App. Cas. 953.

(*b*) See *Jordan v. Money*, 5 H. L. Cas. 185, *infra*, p. 462; *Williams v. Stern*, 5 Q. B. D. p. 409; *Maddison v. Alderson*, 8 App. Cas. p. 473; *Pollock, Contracts* (1894), p. 713; *Moncreiff on Fraud* (1891), p. 101.

Pollock, Contracts (1894), p. 639,

and *Pollock, Torts* (1895), p. 270.

(*d*) See *Pickard v. Sears*, 6 A. & E. 474, explained in *Freeman v. Cooke*, 2 Ex. 654; *Citizens Bank of Louisiana v. First National Bank, &c.*, 6 L. R. H. L. p. 361; *Carr v. L. & N. W. R. Co.*, L. R. 10 C. P. 316; *Pollock, Contracts* (1894), p. 505; *Moncreiff on Fraud* (1891), p. 237.

(*e*) (1891) 3 Ch. p. 111.

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the person to whom it was made intended to act, if such person did act upon the faith of it and suffered loss by so acting (*a*).

2. This was readily done where the representation was fraudulently made, in which case an action of deceit would lie at law.

3. Relief will also be given at law and in equity even though the representation was innocently made without fraud in all cases where the suit will be effective if the defendant is estopped from denying the truth of the representation (*b*).

4. Where there is no estoppel an innocent misrepresentation will not support an action at law for damages occasioned thereby.

5. Estoppel is effective where an action must succeed or fail if the defendant or plaintiff is prevented from disputing a particular fact alleged. But the rule does not apply to an action of deceit, for in such an action the plaintiff relies not on the truth of the statement but upon its falsehood, and he is bound to prove, not only that the representation was untrue, but also that it was fraudulent (*c*).

6. It is doubtful whether relief in the nature of a personal demand has been given in equity in cases which did not involve fraud or to which this doctrine of estoppel would not apply. *Slim v. Croucher* (*d*) is an instance of such relief being given: but since *Derry v. Peek* that case is no longer law (*e*).

Estoppel is only a rule of evidence; an action cannot be founded on estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said (*f*). It may be defined as "an admission of a state of facts, or of fact irrespective of its truth, which, for the purpose of determining their rights and obligations arising out of a given transaction, the parties thereto are entitled to exact from one another, or one of them is

(*a*) See *Freeman v. Cooke*, 2 Ex. 651; *Pickard v. Sears*, 6 A. & E. 469; *Sheffield v. London J. S. Bank*, 13 App. Cas. 333; *Colonial Bank v. Cady*, 15 App. Cas. 267.

(*b*) Cf. *Henderson & Co. v. Williams*, 1891 1 Q. B. 521.

(*c*) *Derry v. Peek*, 14 App. Cas. 37.

(*d*) 1 De F. & J. 518.

(*e*) *Low v. Bouverie*, supra, and see

further *Swan v. N. B. Australian Co.*, 2 H. & C. 175; *Carr v. London & N. W. R. Co.*, L. R. 10 C. P. 307; *Burkinshaw v. Nicholls*, 3 App. Cas. 204; *Re Bahia, &c. R. Co.*, L. R. 3 Q. B. 584.

(*f*) Per *Bowen*, L.J., in *Low v. Bouverie*, supra; and see *Re Bahia, &c. R. Co.*, L. R. 3 Q. B. 584; *Balkis Consolidated Co. v. Tomkinson*, 1 R. 178, (1893) A. C. 396.

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entitled to exact as against the others or other" (*a*); or as defined by Cotton, L.J., in *Simm v. Anglo-American Telegraph Co.* (*b*), it means, that "where one person makes to another a statement [representation] which is afterwards acted upon, in any action afterwards brought upon the faith of that statement by the person to whom it was made, the person making it is not to be allowed to deny the facts were what he represented them to be."

The cases establish the following propositions, namely, that if A. desires to avail himself of the doctrine of estoppel, as against B., he must show that B. fraudulently or innocently made (*c*) a representation of a *fact* (*d*) which was not true, or not true as intended to be understood (*e*); that he, A., was unaware of the untruth of such representation, and did not wilfully abstain from investigating its character (*f*), and that he reasonably, in consequence of such representation (*g*) acted, or refrained from acting, to his prejudice.

If the representation was fraudulent, its ambiguity would not be a defence; but if there was no fraud, A. must show that the representation was of such a nature as to have misled any reasonable man (*h*).

Misrepresentation may be either fraudulent or innocent (*i*). It is wider than fraud. It may be by words or acts, or by refraining from words or acts, or by concealment (*k*).

"It is perhaps doubtful whether it is right to speak of concealment as in any way distinct from actual misrepresentation, because it always occurs in connection with actual representation, either by words or actions, and possibly it would be more correct to say that the fraud is not in concealment but in the words or actions, in consequence of their incompleteness" (*l*).

(*a*) *Cababé on Estoppel*, p. 108; *Heane v. Rogers*, 9 B. & C. 577; *Graves v. Key*, 3 B. & Ad. 313.

(*b*) 5 Q. B. D. p. 213.

(*c*) *Hobbs v. Norton*, 1 Vern. 136; *Hunsden v. Cheney*, 2 Vern. 149; *Burrowes v. Lock*, *supra*; and see judgment of *Kay*, L.J., in *Low v. Bouverie*, *supra*, at p. 109 of the Report.

(*d*) *Maddison v. Alderson*, 8 App. Cas. 473; in which case *Loffus v. Maw*, 3 Gif. 592, was disapproved; *Jordan v. Money*, 5 H. L. Cas. 210; *Licenses, &c. Corp. v. Lawson*, 12 Times L. R. 501; and see remarks of *Kay*, L.J., on *Slim v. Croucher* in *Low v. Bouverie*, (1891) 3 Ch. p. 109.

(*e*) Cf. *Piggott v. Stratton*, *infra*, p. 459.

(*f*) See *Re Eddystone Marine and Re Building Estates Co.*, *Parbury's case*, *infra*.

(*g*) *Freeman v. Cooke*, 2 Ex. 654.

(*h*) Per *Kay*, L.J., in *Low v. Bouverie*, *supra*; *Freeman v. Cooke*, *supra*.

(*i*) *Henderson & Co. v. Williams*, (1894) 1 Q. B. 521, is an instance of misrepresentation which was not fraudulent, see p. 535, line 17, and see *Re Eddystone Marine, &c. Co.*, (1893) 3 Ch. 13, *infra*.

(*k*) *Moncreiff on Fraud* (1891), pp. 82-83.

(*l*) *Moncreiff on Fraud* (1891), p. 86.

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With regard to misrepresentation by silence, it seems that where there is a duty to disclose, and silence is equivalent to a representation that the party has nothing to disclose, an action for deceit or rescission would lie (*a*); in addition to any relief by estoppel, and although there may be no duty arising from contract or other relation between the parties, yet a person may clothe himself with an obligation to disclose, as, for instance, in *Savage v. Foster* (*b*), in which case there was no duty on Mrs. Foster to disclose her title to Williams, but her acts (*c*) in negotiating and assisting in carrying on the marriage created an obligation in her to do something more. Her silence was equivalent to a representation that she had no material facts to disclose. So in *Low v. Bouverie* (*d*), there was no obligation upon the defendant the trustee, to answer the inquiries made, but he took upon himself the obligation to disclose all he knew; and if there had been any suspicion of fraud in that case, which there was not, his silence upon a material fact would have rendered him liable (*e*).

Conduct of omission of this kind, or that referred to as "holding out," or "lying by," or "acquiescence," cannot, unless fraud is proved, be the ground for an action of deceit, but may be a ground for rescission of the contract or may work an estoppel, for, "If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might have otherwise abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act" (*f*).

Misrepresentation may also be the ground of an action of deceit

and see judgment of Lord Cairns in *Peck v. Gurney*, L. R. 6 H. L., p. 403.

(*a*) Moncreiff, *Fraud* (1891), pp. 90 and 328; *Brownlie v. Campbell*, 5 App. Cas. 954; *Peck v. Gurney*, L. R. 6 H. L. 377.

(*b*) *Infra*, p. 455.

(*c*) Cf. *Walters v. Morgan*, 1 De G. F. & J. 723.

(*d*) *Infra*, p. 457.

(*e*) Cf. Moncreiff, *Fraud* (1891), p. 328.

(*f*) Per C. A., *De Bussche v. Alt*, 8 C. D. 314, following *Leeds v. Amherst*, 2 Ph. 117, 123; *Teasdale v.*

T., Sel. Ch. Ca. 59; *Allcard v. Skinner*, 36 C. D. p. 192; *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Powell v. Thomas*, 6 Ha. 300; *Humming v. Ferrars*, Gilb. 85; *Powell v. Thomas*, 6 Ha. 500; *Jackson v. Cooke*, 5 V. 688, 5 R. R. 144; *McManus v. Cooke*, 35 C. D. p. 695; *Quinn v. Moloney*, 28 L. R. Ir. 12; *Sarat Chunder Dey v. Gopal Chunder*, 56 J. P. 741, P. C.; *Wilmott v. Barber*, 15 C. D. pp. 96, 105, *infra*, p. 461; *Procter v. Bennis*, 36 C. D. 740; *Lababé, Estoppel*, p. 82; *Dann v. Spurrier*, 7 V. 251.

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if it be fraudulent. If, for an instance, there is an obligation upon A. to show good faith, and a right in B. to rely thereon, and A. makes a false representation (i.e., by words, acts, or concealment), with regard to a material fact, with the knowledge that it is false or without belief in its truth, and with the intention that B. should be misled by it—if fraud be proved, the motive of the person guilty of it is immaterial(*a*)—and the representation is made to B., directly or indirectly, and he is misled by it, and thereby incurs damage, A. will be liable to B. in an action for deceit(*b*).

If, in cases of contract, there is a false representation of a material fact made by one of the parties thereto by which the other is deceived, then rescission of the contract may be claimed by the party deceived, however honestly the misrepresentation may have been made, and however free from blame the person who made it (*c*); or, if the statement amount to a warranty he may sue upon the breach of it (*d*).

2. Cases illustrating the Doctrine of Equitable Estoppel.

In cases where there is a contract between the parties which one of them is seeking to enforce, such party may be estopped by his conduct from insisting upon the specific performance to which he would otherwise have been entitled. Thus in the case of *Bristol, &c. Aerated Co. v. Muggs* (*e*), the plaintiffs claimed specific performance of a contract to sell certain property. The contract was sufficiently proved by two letters but the plaintiffs afterwards stipulated for an additional term. Such subsequent negotiation was held to act as an equitable estoppel, by which they were prevented from insisting upon the contract as being final and complete. This is an illustration of the principle that there may be conduct on the part of a person seeking a remedy which ought to estop that person from having it (*f*). The same principle may apply to a defence, as where a defendant to an action for specific performance contends that the contract is a nullity,

(*a*) Per Lord *Herschell* in *Derry v. Peek*, p. 374.

(*b*) *Moncreiff*, *Fraud* (1891), 2; *Derry v. Peek*, 14 App. Cas. p. 374; *Angus v. Clifford*, (1891) 2 Ch. 449; *Le Lievre v. Gould*, (1893) 1 Q. B. 491.

(*c*) Per Lord *Herschell* in *Derry v. Peek*, 14 App. Cas. p. 359; *Redgrave*

v. Hurd, 20 C. D. 12; *Karberg's Case*, (1892) 2 Ch. p. 13.

(*d*) *Moncreiff*, *Fraud* (1891), p. 336.
(*e*) 44 C. D. 616; *Fry*, S. P. (1892), p. 258.

(*f*) See dictum of *Selborne*, C., in *G. v. M.*, 10 App. Cas. p. 186, and *L. otherwise B. v. B.*, (1893) P. 274.

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and after having become aware of the facts on which he relies for such contention, goes on acting as though there were a subsisting contract, he will be estopped from taking such objection (*a*).

In *Savage v. Foster* (*b*), Margaret Smith, being seised of lands upon her marriage with Peter Flavill, settled the same upon trustees and their heirs, to the use of the said Peter for life; then, upon Margaret, his intended wife, for life; remainder, after the death of the said Peter and Margaret, to the heirs of the said Peter, on the body of the said Margaret to be begotten; remainder, to the right heirs of the said Margaret for ever. Peter and Margaret had issue, only one daughter (the now defendant), who was married to one Foster. Peter Flavill died, and then his widow married one Brown, by whom she had issue, one other daughter, and no more, which daughter being courted by one Williams, but he refusing to marry her without such a fortune, which Margaret her mother not being able to give without breaking through this settlement, she conveyed the said lands to Williams, &c. And the defendant, Mrs. Foster and her husband, who knew that the lands were settled on her in tail as aforesaid, solicited her mother Margaret Brown to make a conveyance in favour of the said Williams, and were assisting in carrying on the marriage between him and her half-sister Brown.

Margaret therefore conveyed these lands, &c., to the use of herself for life, remainder to Williams and his heirs. Then the marriage took effect, and afterwards Williams sold these lands to the plaintiff Savage, who entered and built a house thereon. Then Mrs. Foster, who was the issue in tail, by virtue of the said settlement (*i.e.* the first), endeavouring to set it up against the title of the plaintiff, who was the purchaser, he exhibited a bill against her to have his title established against that settlement; for that she, having full notice of the purchase, and of her own title, gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though she was a *feme covert*, but that she should be concluded by this fact as well as if she were an infant.

The judgment was as follows: This bill is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder settlement, though she was privy to and assisting in carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser. Now,

(*a*) See Fry, S. P. (1892), p. 599, *Campbell v. Fleming*, 1 A. & E. 40, citing *Flint v. Woodin*, 9 Ha. 618; (*b*) 9 Mol. 35.

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when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser, and in such case infancy or coverture shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants, and *feme coverts*, which any person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary that such infant or *feme covert* should be active in promoting the purchase, if it appears that they were so privy to it, that it could not be done without their knowledge. And it was decreed, that the defendant should levy a fine to the plaintiff, to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession; and that if the defendant shall levy the fine quietly, and without delay, then the plaintiff shall have no costs, otherwise she shall pay costs. And the case of *Watts v. Cresswell* (a) was remembered, where tenant for life borrowed money, and his son, who was next in remainder, and an infant, was a witness to the deed of mortgage; this Court gave relief on the foot of fraud because the infant did not give the mortgagee notice of his title. So in the case of *Clare v. The Earl of Bedford* (b); one Clare, who was an infant, and clerk to an attorney, and had a mortgage on his master's estate, and engrossed a subsequent mortgage thereof to another, without giving notice that the estate was mortgaged before to him; and for that reason, his mortgage was postponed on the foot of fraud.

It will be observed that, according to the statement of facts, Mrs. Foster although she was no party to the transactions which took place

(a) 2 Vin. Abr. 415; 2 Eq. Ca. Abr. 515.

(b) 13 Vin. Abr. 536, 7. In the next session of Parliament the defendant

petitioned to appeal, or to have a rehearing at the peril of costs, and offered to levy a fine on that condition, but it was rejected for not coming in time.

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between her mother and Williams respecting the marriage of the latter with her half-sister, nevertheless took an active part in bringing about the conveyance in favour of Williams, and assisted in carrying on the marriage between Williams and her half-sister. She had no duty to perform, in a legal sense, to any of the persons engaged in the matter. But her silence, coupled with her conduct, amounted to a *suppressio veri* and a *suggestio falsi*, necessarily producing upon the mind of Williams the false impression that she had no interest adverse to that which he was to take by the conveyance. The relief given in this case could not be given now (a), but it is probable that under similar circumstances a person in the position of Mrs. Foster would be estopped from setting up his title as against an innocent purchaser (b).

Lindley, L.J., commenting upon the principal case of *Burrowes v. Lock* in his judgment in *Low v. Bouverie* (c), says that, regarded as a decision on the ground of estoppel it not only appears to be quite right, but remains wholly untouched by *Derry v. Peek* (d). But he also speaks of it as being decided on the ground of estoppel "or possibly fraud" (e); and Lord *Blackburn*, in *Browlie v. Campbell* (f), considers it a case of contract or warranty.

It is to be observed that in the principal case Lock was a trustee. But this imposed upon him no obligation to answer inquiries as to incumbrances upon the trust funds, although if asked he was bound to inform his *cestui que trust* as to the *investment* of the trust funds (g). But if he chose to answer, then it became his duty to answer honestly, that is, to the best of his actual knowledge and belief (h). If he answered honestly, though carelessly, he could not, according to *Derry v. Peek*, be made liable in an action of deceit; but, supposing him in this case, which seems doubtful, to have acted honestly, he was still rightly held liable by the rule of estoppel for a false statement innocently made (i).

In *Low v. Bouverie* (k), a person being entitled under a settlement to a life interest in certain funds, applied to the plaintiff for a loan on the security of such interest. The plaintiff's solicitors thereupon wrote to the defendant Bouverie, who was a banker and one of the

(a) *Cl. Cahill v. C.*, 8 App. Cas. p. 102.
p. 420.

(b) See *Henderson & Co. v. Williams*,
(1895) 1 Q. B. 521.

(c) (1891) 3 Ch. p. 110 and *infra*.

(d) 14 App. Cas. 337.

(e) *Low v. Bouverie*, (1891) 3 Ch.

(f) 5 App. Cas. p. 953.

(g) *Re Tillott*, (1892) 1 Ch. 86.

(h) Per *Lindley, L.J.*, in *Low v. Bouverie*, *supra*. pp. 99, 100.

(i) *Low v. Bouverie*, *supra*

(k) (1891) 3 Ch. 82.

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trustees of the settlement, asking what the trust fund consisted of, and whether the proposed borrower was still entitled to the full benefit of his life interest in such funds. The defendant replied, stating that the life interest was subject to certain charges, specifically mentioning them, but did *not say there were no others*. The advance was therefore made on the security of a mortgage of the borrower's life interest. Subsequently the plaintiff discovered that the life interest was subject to several incumbrances prior to his own, but which the trustee, the defendant Bouverie, had forgotten to mention to the plaintiff, although he, the trustee, had received notice of them. The plaintiff's security being insufficient, he brought an action against the defendant to have him declared liable to pay the total amount due to plaintiff on the mortgage. *North, J.*, thought the case very clear, and following *Burrowes v. Lock (a)* and *Slim v. Croucher (b)*, held the defendant liable for the whole amount advanced by the plaintiff. On the defendant appealing, the C. A. (*Lindley, Bowen, and Kay, L.J.J.*), allowed the appeal, holding, there was no breach of duty as a trustee was under no obligation to do more than answer such inquiries honestly (fraud was not alleged, and there was no suspicion of it); that there was no warranty, as plaintiff and defendant were not contracting parties; that there was *no estoppel*, because in order to create an estoppel the representation must be *clear and unambiguous*, and in this case the defendant did not say there were no incumbrances except those mentioned, in which case it would have been undistinguishable from *Burrowes v. Lock*, but that his statement was consistent with the view that the incumbrances mentioned were all he remembered, and that such a statement would not estop him from showing that there were others which he did not remember; also that to create an estoppel the person to whom it is made must be misled by it, and of this there was no evidence, or not sufficient evidence to satisfy the Court (c).

In *Evans v. Bicknell (d)*, a bill was filed to charge a trustee as having by delivering the title deeds to the tenant for life, enabled him to make a mortgage of a settled estate as tenant in fee. The fraud was not proved, and the bill was therefore dismissed, but without costs, on the ground of negligence. This was a suit in the nature of an action of deceit, and was based upon *Pasley v. Freeman (e)*.

(a) *Supra*, p. 446.*Soc. v. Smithson*, *infra*, p. 463.

(b) 1 De G. F. & J. 518.

(d) 6 V. 174, 5 R. R. 245.

(c) See judgment of *Kay, L.J.* at pp. 113 and 114. Compare *Onward B.*

(e) 3 T. R. 51, 1 R. R. 634.

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In *Slim v. Croucher* (a), a person being asked to lend upon the security of a lease which the borrower represented he was entitled to have granted to him, applied to the lessor and received from him an assurance that he was willing to grant a lease to the borrower. In fact the lease had been already granted and the borrower had mortgaged it, but the lessor had forgotten this fact. The money having been advanced on the faith of the lessor's statement, the C. A. (b) ordered the lessor to repay the money advanced with interest and costs. The Court distinctly held there was no fraud, but proceeded upon the authority of dicta of *Eldon, C.*, in *Freeman v. Bicknell*, and upon the ground that the plaintiff was to be placed as far as possible in the position he was in before the representation was made (c). According to the decision in *Derry v. Peek* (d), an action for deceit, as this was, could not be now maintained because there was no fraud. But if the lender could have sued the lessor to compel him to grant a lease, or in the alternative for damages, the landlord might have been estopped from denying his ability to make the grant. But this would have been an action for specific performance, and such an action could not on the circumstances have been maintained, and as an action cannot be founded upon estoppel (e), the lender could have no remedy (f).

In *Piggott v. Stratton* (g), a vendor induced a man to buy land for building purposes by stating he was lessee of the adjoining land, and could not, owing to the terms of his lease, build upon it so as to obstruct the sea view from the land he was selling. The plaintiff bought the land and built a house. Afterwards the vendor surrendered his lease, and took a new one not containing any restrictions against obstructing the view, and then commenced building so as to obstruct the view from the plaintiff's house. The same Court that decided *Slim v. Croucher*, held that the vendor must be restrained on the ground of estoppel. In this case what was said by the vendor was a representation true in itself of an existing fact. But it was intended to be understood, and was in fact understood as an assurance that he had no power to obstruct the sea view during the currency of the lease, and that so long as the underlease

(a) 1 De G. F. & J. 518, overruled by *Derry v. Peek*, *Low v. Bouverie*, (1891) 3 Ch. 82.

(b) *Campbell, L.C.*, *Knight-Brace and Turner, L.JJ.*

(c) See judgment of *Kay, L.J.* in *Low v. Bouverie*, *supra*, p. 109.

(d) 14 App. Cas. 507.

(e) See p. 451, *supra*.

(f) See *Peek v. Gurney*, *L. R.* 6 H. L. 390; *Brownlie v. Campbell*, 5 App. Cas. 935.

(g) 1 De G. F. & J. 33.

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lasted the underlessee would be safe from the apprehended obstruction (a).

If a person having an incumbrance on an estate, deny the fact upon an inquiry being made by a person about to purchase it, equity will relieve against the incumbrance (b). So likewise, where upon a treaty for a mortgage of an estate, a person who was entitled to be recouped out of the estate, in case a certain incumbrance was levied out of his own estate, was in communication with the mortgagee, to whom he was referred as a person to give information upon the subject of the transaction, but he gave the mortgagee no information of his equitable claim, it was held by *Sydney, C.*, that he could not afterwards set up his claim against the mortgagee (c). But as to the effect of mere silence where there is no duty to speak, see *Osborn v. Lea* (d).

In *Ramsden v. Dyson* (e), Thornton took a piece of land belonging to Sir J. Ramsden, from Sir John Ramsden's agent, by parol agreement. It was known to all parties that the land was to be built upon. A ground rent was fixed at 4*l.* Thornton laid out 1,800*l.* in building, and afterwards made another application to Sir J. Ramsden's agent for another piece of land, also for the purpose of building on it. In this application Thornton declared himself willing to take the land as "tenant-at-will." The land was allotted to him, and the rent fixed at 1*l.* 0*s.* 7*d.* When the buildings were erected on the land, the persons who had so taken the land were entered in Sir John Ramsden's rental books as tenants. It was admitted on all sides, that where such takings were made the tenants would never be disturbed while the ground rent fixed as above described was paid. When the tenant desired to transfer the land to another person, notice was given to the agent, and the entry of the name of the tenant in the books of rental kept by the agent was altered. In many cases the form of proceeding was, that the land was surrendered to the landlord, and the new tenant was accepted, much after the form of a transfer of copyhold. The tenancies were very numerous.

(a) Per Lord *Macnaghten* in *Spicer v. Martin*, 14 App. Cas. p. 23. In the same case (34 C. D. 1) the C. A. had founded their judgment on *Piggott v. Stratton*, and the representation was thought to amount to a contract. See judgment of *Lindley, L.J.* at p. 12.

(b) *Ibbotson v. Rhodes*, 2 Vern. 554;

Amy's Case, cited 2 Ch. Ca. 128; *Hickson v. Aylward*, 3 Mol. 1; *Berrisford v. Milward*, 2 Atk. 49; cf. *Stronge v. Hawkes*, 4 De G. M. & G. 186.

(c) *Boyd v. Belton*, 1 Jo. & Lat. 730.

(d) 9 Mod. 96.

(e) 1 L. R. H. L. 129.

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Thornton alleged that there was believed to exist, and that Sir John Ramsden's agents had, by their words and conduct, encouraged such belief, a "tenant-right tenure" on the estate, that a person who had so taken and built upon Sir John Ramsden's land was entitled at his pleasure to become a leaseholder, and to demand a grant of a lease for sixty years, renewable every twenty years on payment of a fine equal to double the annual ground rent. Such leases had, in fact, been granted; but there was no direct evidence of their being granted on any such claim of right. There was, however, evidence that a railway company, being desirous of obtaining some of these pieces of land, held under parol agreement, on payment of a ground rent, had refused to purchase them unless such leases were granted, and that in fact, such leases were granted, and thus the tenants received compensation for their buildings. It was held by the House of Lords (dissentiente Lord *Kingsdown*), reversing the decree of Sir *John Stuart*, V.-C. (a), that these circumstances did not show the existence of anything greater than a tenancy from year to year, and did not establish any title to compel the grant of a lease; and, consequently, that the landlord having brought ejectment against Thornton, equity could not interfere to compel the grant of a sixty years' lease, nor to stay the ejectment. In the case of *Wilmott v. Barber* (b), *Fry*, J., laid down the circumstances under which the owner of a legal right will be estopped by his acquiescence from asserting it as follows:—"A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land), on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right, which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does

(a) Reported 4 Gif. 519 (nom. Thornton v. Ramsden).

as to the question of costs only, 17 C. D. 772.

(b) 15 C. D. 96, reversed in an appeal

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not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal title from exercising it, but, in my judgment, nothing short of this will do" (a).

In *Jordan v. Money* (b), a lady to whom a gentleman owed a debt on a bond, and who was at that time a great friend of his, induced him to marry by a promise that she would never enforce the bond. She changed her mind and brought an action on the bond after the marriage. It was urged that upon the doctrine of representation she was not at liberty afterwards to enforce her claim. There was some difference of opinion with regard to the facts, but the House of Lords held she was at liberty to enforce her claim. "I think," said Lord *Cranworth*, "that that doctrine (*i.e.*, the doctrine of representation) does not apply to a case where the representation is not of a fact, but a statement of something which the party intends or does not intend to do." "If," says a learned editor (c), "this case was rightly decided, a person is not estopped by a representation or promise as to what he will do in the future, provided that he is sincere at the time when the other party acts on his promise" (d).

In *Mills v. Fox* (e), a female infant ward of Court was entitled to certain property as one of two tenants in tail. Part of this, Blackacre, was taken by a company and the money paid into Court. Proposals for a settlement on her marriage were submitted to the Court, which stated that she was entitled as tenant in common in tail to certain specified property, and that it was proposed to bar the entail and vest the whole in trustees. Amongst the property so specified was Blackacre. The settlement was approved and carried out by a disentailing deed in 1884, which included Blackacre but did not mention the fund in Court. After the marriage the lady

(a) See *Procter v. Bennis*, 36 C. D. 740.

(b) 5 H. L. Cas. 185.

(c) *Moncreiff on Fraud* (1891), p. 239.

(d) See *Maddison v. Alderson*, 8 App. Cas. p. 473; *Citizens Bank of Louisiana v. First National Bank, &c.*,

L. R. 6 H. L. 352; *Gillinan v. Carbutt*, 61 L. T. 281; *Montefiore v. M.*, 1 Bl. W. 363; *Gale v. Lindo*, 1 Vern. 475; *Pickard v. Sears*, 6 A. & E. 475; *Freeman v. Cooke*, 2 Ex. 663; *Dalbac v. D.*, 16 V. 125; *West v. Jones*, 1 Si. (N. S.) 208.

(e) 37 C. D. 153.

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disentailed the fund in Court and claimed it as her absolute property. The trustees brought an action to establish their right to the fund in Court. Held, that the fund in Court was not affected by the deed of 1884; but that as the marriage and settlement were sanctioned by the Court upon the faith of a representation made in her behalf that she was entitled in tail to a moiety of the property, the purchase money of which was represented by the fund in Court, she was bound in equity to make good such representation notwithstanding her infancy at the time it was made, and that she, being the only person besides the plaintiffs who could claim any interest in this fund, was estopped from setting up any title to it adverse to the plaintiffs.

An estoppel can only be effected by what is express and clear. Inference is not enough to create an estoppel. There must be a distinct positive statement of the *fact* which is relied on as creating it. Thus, in *Onward Building Society v. Smithson (a)*, Toward obtained from trustees a conveyance of Blackacre which he mortgaged to B. He subsequently by a trick induced his vendors the trustees to execute a second conveyance to him of part of the same land. This second deed recited, that their testator was seised in fee at his death, and recited his will devising the estate to them, &c., the contract for sale in fee simple free from incumbrances. The trustees covenanted against incumbrances, and one of them for title as beneficial owner, but there was no statement that the vendors were seised in fee. Toward then mortgaged the land to the Building Society, the plaintiffs, and they then became *bonâ fide* purchasers for value without notice. B. afterwards took possession under his mortgage, and the security to the society became worthless. The plaintiffs brought an action against the trustees for indemnity on the ground of misrepresentation, and on the covenants for title. *Kekewich, J.*, gave judgment in favour of the plaintiff on the covenants for title. The C. A. *(b)*, held that the plaintiffs as assignees of a mere equity of redemption could have no remedy against the defendants on the covenants for title as there was no legal estate with which they could run, and that though the recitals led to the inference that the vendors were seised in fee the deed did not state that they were, and so they were not estopped from saying that the plaintiffs took no legal estate by their convey-

(a) (1893) 1 Ch. 1; *Right v. Bucknell*, *infra*. Compare *Low v. Bouverie*, *supra*, p. 458.

(b) *Lindley, Bowen, and A. L. Smith, L.JJ.*

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ance from Toward (a). A point arose in this case which it was not necessary to decide, but which is of importance. Supposing that in the last-mentioned case the defendants had been estopped from denying that the plaintiffs had the legal estate, and had pleaded fraud: could the plaintiffs have successfully replied, We are purchasers for value without notice. Could they, in short, have maintained an action on the covenants which Toward himself could not have maintained? (b)

If the director of a company is found acting as such at a time when he could not properly so act without possessing shares, he may estop himself from denying that he has entered into a contract to take shares (c). But if the director of a company sells his qualification shares, his name remaining on the register as the person entitled to the shares, the purchaser is not thereby estopped from setting up his title to the beneficial interest therein (d).

In *Re Bahia, &c., Ry. Co.* (e), T. was the registered holder of five shares in the company. She deposited the certificates with her broker. These certificates, together with a transfer from T. to S. and G. purporting to be signed by T. but which was a forgery were left with the secretary of the company for registration, and after sending the usual notice to T. and receiving no answer, the transfer was registered and share certificates handed to S. and G. A., *bonâ fide* for value, and without notice, bought these shares on the market in the usual course of business, and was duly registered as holder of them, and share certificates were duly handed to him by the company. The forgery was discovered. The company were ordered to restore T.'s name to the register under the Companies Act, 1862, s. 35, and upon a special case stated under that section it was held that the giving of the certificates by the company to S. and G. amounted to a statement by the company, intended by the company to be acted upon by

(a) Cf. *Right v. Bucknell*, 2 B. & Ad. 278; *Clark v. Hall*, 24 L. R. Ir. 316; *Heath v. Crealock*, 10 Ch. 22; *General Finance, &c. Co. v. Liberator Permanent B. S.*, 10 C. D. 15; *Lainson v. Tremere*, 1 A. & E. 792; *Cuthbertson v. Irving*, 4 H. & N. 742; *Re Eddystone Marine Insurance Co.*, (1893) 3 Ch. 9; p. 466 *infra*, as to estoppel by recitals in contract.

(b) Cf. *Foster v. Mackinnon*, L. R.

4 C. P. 764; *Simin v. Anglo-American, &c. Co.*, 3 Q. B. D. 188.

(c) *Brown's Case*, 9 Ch. 106; *Ex p. Inchiquin*, (1891) 3 Ch. 28; *Ex p. Cammell*, (1894) 1 Ch. 528.

(d) *Howard v. Sadler*, (1893) 1 Q. B. 1.

(e) L. R. 3 Q. B. 584; *Re Ottos Kopje, &c. Mines*, (1893) 1 Ch. 618, where *Re Bahia, &c.*, is explained.

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purchasers of shares in the market, that S. and G. were entitled to the shares, and that A. having acted upon such statement the company were estopped from denying its truth, and damages were recoverable by A. from the company to the value of the shares at the time the company refused to recognize him as a shareholder (a). In *Balkis Consolidated Co. v. Tomkinson* (b) the plaintiff was the vendor of the shares instead of the purchaser, but this was held to make no difference. In *Simm v. Anglo-American, &c. Co.* (c), Burge bought stock in the defendant company, and received a transfer of stock purporting to be executed by Coates who was the registered owner, but which was in fact forged. Burge borrowed money from a bank, the stock was transferred to Ingelow as trustee for the bank, and he was registered owner and holder of the certificates. Burge then repaid the bank, and Ingelow, the bank's trustee, became trustee for Burge. On the discovery of the forgery the company refused to recognize Ingelow as the owner of the shares, and Burge and Ingelow brought an action to compel them to recognize their title. The C. A. (d) overruling *Lindley, J.*, held that the company were not liable, for when the loan was paid off, and Ingelow became merely a trustee for Burge, no estoppel existed in favour of Burge against the company, for Burge had acted on the faith of the forged transfer and had not relied upon any act of the company, and by sending the forged transfer to the company had induced them to recognize his nominee as the holder (e).

As between banker and customer the authority given to the former by the latter is, in cases in which they the bankers have agreed to retire acceptances on account of their customers, to pay to the order of the person named as payee, and if they pay to another they cannot charge the customer (f), but representations made directly to the banker by the customer upon a material point, untrue in fact and on which the banker acted by paying money which he would not otherwise have paid, will throw the loss on the customer (g).

(a) See further *Hart v. Frontino, &c. Co.*, 5 Ex. 111; *Carr v. London & N. W. R. Co.*, L. R. 10 C. P. 307; *Barton v. L. & N. W. R. Co.*, 24 Q. B. D. 77.

(b) (1893) A. C. 396.

(c) 5 Q. B. D. 188.

(d) *Bramwell, Brett, and Colton*, L.JJ.

(e) See *Foster v. Tyne Pontoon R. W. & T.*—VOL. I.

Co., 63 L. J. Q. B. 50.

(f) *Robarts v. Tucker*, 16 Q. B. 560.

(g) See judgments of Lord Selborne and Lord Watson, *Bank of England v. Vagliano*, (1891) A. C. 106. See further as to estoppel by negligence, *Scholfield v. Londesborough*, (1895) 1 Q. B. 536, and the comments of *Esher, M.R.*, upon *Young v. Grote*, 1 Bing. 253, at p. 543.

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In *The Colonial Bank v. Cady, &c.* (a), the executors of W. had vested in them certain shares in a corporation in New York. The certificates were in a form which contemplated the holder of them being entitled to transfer them by a form which, though on the same paper as the certificate, was a separate instrument, and when signed by the person who on the face of the instrument was stated to be the owner, purported to transfer to someone else, by the execution of this form of assignment, his property in the shares. The executors of W., in order to get themselves registered in the books of the company, entrusted the certificates to one Blakeway, who in fraud of the trust reposed in him, pledged the certificates to raise money for himself, with the bank. The shares were not negotiable instruments, and the executors were informed that in order to get themselves registered they must sign their names at the end of these transfers on the back of the certificates, and they so signed them, as executors, without filling up the blanks, and then gave them to Blakeway never intending to part with the property in them, but simply parting with the custody for the purpose aforesaid. It was held by the House of Lords (b) that the form of the transfer was equally consistent with two purposes on the part of the executors, either that they were going to sell these shares and transfer them to someone else, or that they were signing in order to get themselves registered. That bank, therefore, must be taken to have known that the possession of Blakeway was consistent with either of these purposes, and that it could not assume, when dealing with a broker in possession of such certificates, that he had authority to complete a transfer, such possession being equally consistent with his holding them for the purpose of registration, that the executors of W. were therefore not estopped from setting up their title against the bank (c). But a person taking *negotiable* securities in good faith and for value, will obtain a good title though he takes from one who had none (d).

In *Re Eddystone Marine, &c. Co.* (e), a private company passed resolutions allotting certain shares as fully paid up to the directors,

(a) 15 App. Cas. 267.

(b) Affirming the C. A., 38 C. D. 388, overruling *Kekwick, J.* 36 C. D. 659.

(c) Cf. the judgment of *Cairns, C.* in *Goodwin v. Roberts*, 1 App. Cas. p. 470, commented on by Lord *Bramwell* in the above case; *Colonial Bank v. Cady, &c.* 15 App. Cas. p. 282; and

see *Bentinck v. London J. S. Bank*, (1893) 2 Ch. p. 144.

(d) *London Joint Stock Bank v. Simmons*, (1892) A. C. 201; and see *Bentinck v. London J. S. Bank*, *supra*.

(e) (1893) 3 Ch. 9.

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&c., and a contract was executed between the company of the first part and the allottees of the second part, and duly registered, by which it was agreed that such shares should be allotted to the directors, &c., in consideration of services rendered. The contract recited that the company was indebted to the allottees for services rendered and expenses incurred by them. In the winding up the liquidator placed these allottees on the list of contributories and *Wright* held they were rightly so placed. It was contended on appeal that the company was estopped by the recitals in the contract. The C. A. held that the stipulation to take these shares as being fully paid was *ultra vires* (a), and that the company could not be estopped by putting into that document an untruth.

In *Re Building Estates, &c. Co., Parbury's Case* (b), one *Wright* was entitled to fully paid up shares in a company under a contract, which, however, was not duly filed with the Registrar. *Parbury* agreed with *Wright* to invest 500*l.* in the shares of the company, and sent *Wright* his cheque for that amount. *Wright* told *Parbury* that 100 5*l.* shares had been allotted to him, and that the 500*l.* had been applied in paying for them; and *Parbury* received from the company a certificate stating that he was "the proprietor of 100 shares of 5*l.* each, &c., &c.," and that he had "paid in respect of each of such shares the amount stated on the back of the certificate," naming 5*l.* This was untrue, for no part of *Parbury's* 500*l.* was ever paid to the company, but *Wright* had procured 100 of his paid up shares to be allotted to *Parbury* as his nominee. The liquidator placed *Parbury* on the list of contributories. *Vaughan-Williams, J.*, held that *Parbury*, although an allottee, could rely on the estoppel by the certificate, as he had no knowledge of the circumstances, and had not wilfully abstained from ascertaining them. *Semble*, that the distinction between this case and that of *Re Eddystone Marine*, is that in the former case the party seeking to avail himself of the estoppel knew the true facts; in the latter case he did not know them and did not wilfully abstain from knowing them, and was therefore misled (c).

In *Re Economic Fire Office* (d) the company granted a policy to *G. & Co.* guaranteeing the fidelity of *Goodyer*, who paid the first

(a) *Trevor v. Whitworth*, 12 App. Cas. 409; *Ooregum Gold, &c. Co. v. Roper*, (1892) A. C. 133. See further as to the liability of companies to be bound by representation, *Re British Farmers', &c. Co.*, 7 C. D. 335;

Burkinshaw v. Nicolls, 3 App. Cas. 1004.

(b) (1896) 1 Ch. 100.

(c) *Re Veuve Monnier &c.*, 12 Times L. R. 460.

(d) 12 Times L. R. 142.

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year's premium. Goodyer borrowed the sum for the second year's premium from the agent of the company, who gave him a receipt for the amount, and this he sent to G. & Co. Goodyer afterwards absconded. G. & Co. were held entitled to prove for their claim in the winding up of the company, as the company was estopped by the receipt from denying payment of the premium.

With respect to estoppel you must choose your remedy, you cannot both rely on estoppel and also on the real facts. If the estoppel makes A. and B. liable, and the facts make B. and C. liable, neither the estoppel nor the facts nor any combination of the two can possibly make A., B. and C. all liable jointly (a).

If a man holds himself out as a partner in a firm, and thereby induces another person to act upon that representation, he is estopped as regards that person from saying that he is not a partner (b).

A tenant who has been let into possession of land by a lessor is estopped from disputing his lessor's title. But third persons not claiming possession under the tenant are not so estopped (c). In *Grosvenor Hotel Co. v. Hamilton* (d) a landlord sued for rent, counterclaim for damages for nuisance from vibration which the Court held had brought the house down. The plaintiffs said the house was unstable, but they let the house in that condition, and as against these tenants they were estopped from setting up its instability (e). This case shows how fine the distinction sometimes is between contract, warranty, and estoppel (f).

In *Henderson & Co. v. Williams* (g) the owners of certain sugar were induced by the fraud of F. to instruct certain warehousemen to transfer it to the order of F. F. sold the goods for value, and the warehousemen informed the purchaser, before the price was paid, that they held the sugar on account of F., and would upon F.'s order hold it for the purchaser. The fraud being discovered, the warehousemen refused to deliver the goods. On an action by the purchaser against the warehousemen, they were held estopped from denying his title, having attorned to him.

(a) Per *Selborne, C.*, *Scarf v. Jardine*, 7 App. Cas. 345, 350.

(b) *Re Fraser*, (1892) 2 Q. B. 633.

(c) *Tudman v. Henman*, (1893) 2 Q. B. 168.

(d) (1894) 2 Q. B. 836.

(e) See judgment of *Lopes, L.J.*, and compare with that of *Duvey, L.J.*

(f) See judgment of *Lindley, L.J.*, in *Low v. Bouverie*, (1891) 3 Ch. p.

102.

(g) (1894) 1 Q. B. 521; *Pickard v. Sears*, 6 A. & E. 469; *Cornish v. Abington*, 4 H. & N. 549; *Freeman v. Cooke*, 2 Ex. 654; *Stonard v. Donkin*, 2 Camp. 344; *Gosling v. Birnie*, 7 Bing. 399; *Rogers v. Lambert & Co.*, (1891) 1 Q. B. 318; approving *Biddle v. Bond*, 6 B. & S. 225.

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If a principal has entrusted goods to an agent for some other purpose than for sale, or if he has entrusted them to an agent upon a condition that he is not to sell them without further authority and the agent sells the goods, the principal is not estopped from disputing the purchaser's title (a).

3. Infancy and Coverture.

The law on this subject is well summed up in the case of *Savage v. Foster*; "In the case of fraud, *infancy or coverture shall be no excuse*; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and feme coverts, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet, when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary that such infant or feme covert should be active in promoting the purchase, if it appears that they were so privy to it that it could not be done without their knowledge."

Where a person enters into a contract during his minority, he is not, either at law or in equity, bound thereby after his majority on the mere ground that without any false assertion on his part the other party believed him to be of age (b).

In order, however, that relief may be obtained against an infant, it is not essential that he should actively encourage the fraud (c), if he be privy to it. Thus in *Watts v. Creswell* (d), cited in *Savage v. Foster*, a tenant for life borrowed money, and his son, who was next in remainder, and an infant, was a witness to the mortgage deed, and the Court relieved on the ground of the fraud in the infant, by not giving notice to the mortgagee of his title. That certainly was a very strong case; for the young man who was employed in soliciting the loan had only heard that the lands were settled upon him after his father's death. But Lord Cowper said: "If an infant is old and

(a) *Bigg v. Evans*, (1894) 1 Q. B. 88.

(b) *Stikeman v. Dawson*, 1 De G. & Sm. 105.

(c) But see the judgment in *Stikeman v. Dawson*, *supra*; and in *Ex p. Jones*, 18 C. D. 109.

(d) 2 Eq. Ca. Abr. 515.

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cunning enough to contrive and carry on a fraud, he ought to make satisfaction for it."

The principle invariably acted upon by the Court of equity is this, that an infant shall not take advantage of his own wrong. Thus in *Clarke v. Cobley* (a), a woman, at the time of her marriage, was indebted on two promissory notes. After the marriage the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes. The bond having been put in suit, the husband pleaded his infancy at the time of giving the bond. On a bill being filed in equity for relief, the Court ordered the notes to be returned to the plaintiff with directions that the defendant should not plead the Statute of Limitations to any action the plaintiff should bring on the notes, or any other plea which the defendant could not have pleaded at the time the bond was given. And see *Lemprière v. Lange* (b), where a lease obtained by an infant upon an implied representation that he was of age was set aside as void on the ground of fraud, and possession was ordered to be given up, but it does not appear to be very obvious why the Master of the Rolls refused to make him liable for use and occupation.

Although a mortgage by an infant, falsely representing himself to be of age, might be good as against himself, nevertheless it will not be so as against a subsequent mortgage made after he attained his majority to a person who advanced his money without notice of the first mortgage. In *Iaman v. I.* (c) an infant charged his reversionary interest in a fund with payment of a sum lent to him upon his promissory note, and executed a statutory declaration stating (untruly) that he was then of full age. After attaining twenty-one, he mortgaged his interest in the fund for an amount exceeding what was ultimately available, without disclosing the fact of the prior charge. It was held by *Bacon, V.-C.*, that the charge given by the infant during his infancy and incapacity to contract was avoided by the subsequent mortgage executed by him when of full age and capable of contracting, to a mortgagee without notice; but a learned author points out that the report is not altogether consistent, and that possibly the Court was influenced by the nature of the previous transaction in which the infant had agreed to pay 75 per cent. for an advance made to him (d).

Although an infant may falsely represent himself of age, a person

(a) 2 Cox, 173.

(b) 12 C. D. 675.

(c) 15 Eq. 260.

(d) *Simpson on Infants* (1890), by Elgood, p. 74.

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aware that he was not of age, and who was therefore not deceived by such representation, cannot obtain relief in equity (*a*).

An infant known to the other party to be so, is not bound by acquiescence, as by allowing another to act on the faith that the infant will do or not do certain things, but if the acquiescence or untrue representation continue after twenty-one, he will be bound (*b*).

Married Women.—*Savage v. Foster* (*c*) is said to be the only case where the Court decreed a wife to levy a fine (*d*). A married woman has now (in the absence of fraud on her part) by law no power of control or alienation over her real estate (not separate), except such as is given to her by s. 77 (2) of the Fines and Recoveries Act, and the power thereby given to her is conditional on its execution in the manner which the statute prescribes; and when the conditions have not been complied with, then there is no contract of which, according to the established rules of law and equity, specific performance can be decreed (*e*).

But there is a wide difference between not holding a married woman not bound by a contract, and holding her not bound by misrepresentation and fraud (*f*), and she has frequently been held bound by equitable estoppel. Thus in the case of *Peterson v. Hickman* (*g*), where the husband made a lease of the wife's land, and the lessee, being ignorant of the defeasible title, went to great expense in building upon the land, the wife having, upon the husband's death, avoided the lease at law, she was compelled in equity to yield a recompense for the buildings and improvements upon the land (*h*).

In *Sharp v. Foy* (*i*), on the marriage of a female infant her husband covenanted that if and when his wife attained twenty-one he would concur with her if she would consent in settling her real estate. She attained twenty-one, but no settlement of the real estate was made. The husband and wife then joined in a mortgage of the wife's realty to secure a loan to the husband, and the mortgagee was informed by both husband and wife that no settlement existed. The

(*a*) *Nelson v. Stocker*, 4 De G. & J. 458.

(*b*) *Goode v. Harrison*, 5 B. & A. 147; *Belton v. Hodges*, 9 Bing. 365; *Simpson, Infants* (1890), by Elgood, 102.

(*c*) *Supra*.

(*d*) See *Cahill v. C.*, 8 App. Cas. p. 422 *arguendo*.

(*e*) *Cahill v. C.*, 8 App. Cas. 420.

(*f*) Per *Gifford, L.J.*, in *Re Lush's T.*, 4 Ch. p. 601.

(*g*) Cited by *Ellesmere, C.*, in his judgment in the *Earl of Oxford's Case*, 1 Ch. 1, *post*.

(*h*) See also *Vaughan v. Vanderstegen*, 2 Drew. 363, 378, 379.

(*i*) 4 Ch. 35.

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mortgagee discovered the settlement, before the mortgage deed had been acknowledged by the wife. On bill by the mortgagee it was held the misrepresentation of the wife constituted a fraud, and that the mortgagee had priority over the persons interested under the settlement (*a*), and she may bar her equity to a settlement by a fraud though influenced to commit it by her husband (*b*).

(*a*) See *Mills v. Fox*, *supra*, p. 462. *Arnold v. Woodhams*, 16 Eq. 34.

(*b*) *Re Lush's Tr.*, 4 Ch. 591; cf.

GUARDIAN AND WARD.

MR. JUSTICE EYRE v. COUNTESS OF
SHAFTSBURY.

1722. 2 P. W. 103; Gilb. Eq. Rep. 172.

Guardian and Ward.

A guardianship, devised to three persons, without saying "and to the survivors or survivor of them," yet the survivor shall have it (*a*).

The right of the testamentary guardian, by the express words of the Act of Parliament, takes place of all other guardians, and his authority, by that law, is a continuation of the paternal authority.

The mother of a ward of the Court, contriving and effecting his marriage, without obtaining the consent of the testamentary guardian, or making an application to the Court, is liable for a contempt of the Court, although the marriage be in other respects proper.

THE late Earl of Shaftsbury, by his will, dated 10th of November, 1710, devised the guardianship of the person and estate of his infant child (the present Earl) to Mr. Justice Eyre and two others (since deceased), without saying "and to the survivor of them:" and this devise of the guardianship was until the child should come to twenty one years of age.

Lord Shaftsbury died beyond sea, and the infant earl was now twelve years of age, when Mr. Justice Eyre, perceiving that his lordship had not a proper governor provided for him by the countess his mother, and that the person who was ordered to attend him as his gentleman was not a fit person for that purpose, petitioned the Lord Chancellor that he, as sole surviving guardian, might have the ordering, as he should think proper, of such governor, gentleman, and other

(*a*) S. C., 2 Eq. Ca. Abr. 710, pl. 3; 755, pl. 4.

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servants to attend the said infant earl; and that the person of the said infant earl might be delivered over to the petitioner.

Argument for the Respondent (a).—On the behalf of the countess, it was insisted by the *Solicitor-General*, Mr. *Lutwiche*, Mr. *Cowper*, and Mr. *Talbot*, that the guardianship, being devised to three, without saying “and to the survivor of them,” the same did not survive; that it is but a bare authority, and no interest, in regard no profit could be made thereof; that, if a power were given to three, and one of them should die, the survivors could not execute such power; that, if two were made committee of a lunatic, on the death of one of them, the commitment would determine, that this was a trust annexed to the person, and not assignable nor was it reasonable it should survive, forasmuch as the testator might think it proper to trust three, but not to invest a smaller number with a charge of that importance.

Also it was said, that, if the infant earl should die without issue under age, in such case the late earl by his will had given an annuity of 500*l.* per annum to Mr. Justice Eyre, which made it improper that he alone should be trusted with the person of the infant earl, who would be a gainer on his dying without issue and under age; that, the will having appointed three guardians to the infant, it was the same thing as if the testator had appointed those three jointly, and then it was plain, that, if one should die, the survivors could not act; that, according to *Auditor Curle's case (b)*, where an office is granted to two, on the death of one of the grantees, the office determines.

And though it might be attended with some inconvenience were such guardianship or authority to determine on the death of one of the persons intrusted, yet it must be allowed to have been in the power of the testator to have prevented this inconvenience, by limiting the guardianship to the survivor by express words (c).

It was, moreover, urged, that this was a matter of trust; for every guardianship was a trust (d); that the Crown, as *parens patriæ*, was the supreme guardian and superintendent over all infants; and since this was a trust, it was consequently in the discretion of the Court, whether or no they would do so hard a thing as to take away

(a) The arguments have been greatly retrenched.

(b) 11 Co. 2 b.

(c) Salk. 465.

(d) See *Duke of Beaufort v. Bertie*, 1 P. W. 704; *Frederick v. F.*, 1 P. W. 721.

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an infant under thirteen years of age, from so careful a mother as the countess was; that the tender calls of nature were on the mother's side; and then there were two physicians (Dr. Robinson and Dr. Friend), who both testified that the infant earl was of a tender and sickly constitution; so that at least the Court might refuse to grant this in a summary way, or otherwise than upon a bill.

* * *

Argument for the Petitioner (a).—On the other side it was said, that this guardianship was not devised to three jointly, but to three until the infant earl should come to twenty-one; that a guardian had not only a bare authority, but also an interest, for he might bring a writ of ravishment of ward, or might make a lease during the minority of the infant, as was determined in the case of *Shephard v. Ryoler (b)*; so that guardians had an interest coupled with their authority, and consequently the office would survive.

It was true it could not be granted over: no more could the office of executorship: but yet there could be no question but that, if there had been two executors, and one should die, the other would take the whole executorship as survivor.

And as to the objection, that there was no profit in the guardianship, and therefore it should not survive, the same way of reasoning would hold in the case of an executorship, for that was barely a trust and no ways profitable; notwithstanding which, being a legal interest, it would survive. It was likewise said, that in case where three guardians were appointed, if this were supposed to be but a joint authority, and consequently not to survive, it would prove a great inconvenience, and in a good measure frustrate the intention of the person appointing them.

As to what was held in *Auditor Curle's case* (viz.), where an office has been usually granted to two, and one of them dies, that this is a determination of such office, the reason must be supposed to be, because they both make but one officer, as in the case of the sheriffs of Middlesex.

That, with regard to the 500*l.* per annum given to Mr. Justice Eyre, in case of the infant's death without issue and under age, that

(a) See note (a), p. 474.

(b) Cro. Jac. 55, 98.

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could be no objection in case of a testamentary guardian appointed by the party himself, whatever it might be where the guardian was to be appointed by the Court; for, where the testator himself says that J. S. shall be guardian of his son, and by the same will also declares that the said guardian shall have the whole estate in case the child shall die within age, surely that would be good; much more shall the devise in our case, which is but a small part of the estate.

Then, as to the objection of hardship from the guardians being empowered to impose servants, governors, &c., who, when put upon the young lord by such guardian, would probably not regard the countess, as having no dependence upon her, this might be as well turned the other way (*viz.*), that if they were put in by the mother, they would have no regard to the guardian, who yet was intended by the will to be *in loco parentis*, and to supply the father's place.

That Dr. Stubbs, the governor, might be a good scholar and a pious man, and yet it would not necessarily follow that he was a proper governor to attend the young earl to court, or to noble families or at the exercises of dancing and riding, which it was fit his lordship should be acquainted with. Besides, it was of great consequence, in regard such servants are apt to flatter their young master, and to entertain their thoughts with such things as would be rather pleasing than useful to them. * * *

LORD CHANCELLOR MACCLESFIELD.—The father, by the statute (*a*), has a right to dispose of the guardianship of his child until twenty-one, and, having done so here, it will be (*b*) binding, unless some misbehaviour be shown in the guardian, in which case, it being a matter of trust, this Court has a superintendency over it.

But as to the objection, that this right of guardianship does not survive, because it is not said in the will in express terms that it shall go to the survivor, there seems to be no colour for it; because, where several guardians are appointed by a will, each of them seems to be a complete guardian, like the case where there are two or three churchwardens of a parish, each of them is a distinct churchwarden; and it would be mischievous, and of very ill effect, if, where there

(*a*) 12 Car. 2, c. 24.

(*b*) See *Dillon v. Lady Mountcashell*, 4 Bro. P. C. 366, Toml. ed.

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are several guardians appointed by a will, and some refuse to act, that the rest should not be able to do anything; and yet this must be the consequence if a guardianship devised to several should be taken to be one joint naked authority; such construction would make the Act of little force. A guardian has an authority coupled with an interest, and may bring a *writ of ravishment* of ward (a) on the infant's being taken from him; and though it is true that the damages recovered shall, by the statute, go towards the benefit of the ward, yet the declaration must lay it *ad damnum* of the guardian the plaintiff.

The reason of *Auditor Curle's case* (b), where, on the office of auditor being granted to two, without saying "and to the survivor," such office, on the death of one, was held to be determined, was because, in such case, both made but one officer, as the two sheriffs of Middlesex make, as to their office, but one person. In the present case, here is a plain right placed and vested in Mr. Justice Eyre, as the surviving guardian, and who, everyone is assured, will well execute such trust, which it will be impossible for him to do without being allowed to place and choose the governor, gentleman, &c., to attend upon and take care of this young nobleman.

And, though Dr. Stubbs may be a good, learned, and pious man, yet he may not be so fit to attend the young earl to all places; for instance, to courts, places of exercise and diversion, &c., at which it may be proper for his lordship to appear.

But I must differ from Mr. Justice Eyre, as to sending the infant to a public school, which may be thought likely to instil into him notions of slavery (c).

Wherefore, *per Cur.*, discharge Dr. Stubbs from being governor, as

(a) This writ was given by the Stat. West. 2 (13 Ed. 1, c. 35) to the Guardian in Chivalry to recover the body of the ward. And by the equity of Stat. West. 2 (13 Ed. 1, c. 24), which gave a writ *in consimili casu* the guardian in socage might have ravishment of ward. Military tenures were abolished by 12 Car. 2, c. 24, by which an action of ravishment of ward or trespass was given to the testamentary

guardian. The writ *in consimili casu* was abolished by 3 & 4 Will. 4, c. 27, s. 36, and the ordinary remedy to recover the body of an infant either by the father or the guardian is now by *Habeas corpus*. See *Re Marston*, 17 W. R. (Q. B. Ir.), 794.

(b) 11 Co. 2 b.

(c) At the present day a different view of the effect of a public school education would probably be entertained.

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also Mr Bennett from being gentleman, and deliver the infant into the hands of his guardian, Mr. Justice Eyre, who desired the young earl might dine with him. But the Lord Chancellor said, that this was in confidence, that the Judge should return him to his mother the countess, at night ; for that, as yet, the Court would not make any order touching the custody of the earl's person.

Afterwards, on the Great Seal's being taken from the Earl of Macclesfield, and placed in the hands of three Lords Commissioners, on the 18th of March, 1724, Mr. Justice Eyre (lately made Lord Chief Baron of the Exchequer) exhibited his petition to the Lords Commissioners, setting forth the former proceedings : and that the infant earl, who was now just fourteen years of age, and had been married to Lady Susannah Noel, daughter to the Countess of Gainsborough, was detained from the petitioner : that such marriage was *without the consent or privity* of the said Lord Chief Baron, the surviving guardian. Therefore the petitioner thought it his duty to lay these things before the Court, praying that the custody or tuition of the infant lord might be granted to him, and that the Court would make such order touching this matter as they should think proper.

Upon this the Dowager Countess of Shaftsbury petitioned the Lords Commissioners, that the order of the late Lord Macclesfield, declaring the right of guardianship to belong to the Lord Chief Baron Eyre, and directing the person of the infant earl to be delivered to the said Lord Chief Baron, might be set aside.

Also, the infant earl petitioned the Lords Commissioners, insisting that the guardianship of his lordship, given by the will, was determined by the death of two of the guardians, and praying that his lordship, being now of the age of fourteen years, might be at liberty to choose his guardian.

On hearing these petitions, the Court ordered a sequestration, unless cause, both against the Countess (dowager) of Shaftsbury, and against the Countess of Gainsborough, for their contempt in contriving and effecting this marriage without the consent of the guardian, and without applying to the Court. And the person of the infant earl was ordered to be restored by the Countess Dowager of Shaftsbury to the Lord Chief Baron, it being the opinion of the

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Court, that though the declaration made by the late Lord Chancellor that the right of guardianship did belong to the Lord Chief Baron as surviving guardian, and the order made thereupon was ever so erroneous, yet that the same was a good order until reversed and, consequently, it was a contempt to break it.

Judgment by the Lords Commissioners—On the 15th of May the three Lords Commissioners (viz.), Sir *Joseph Jekyll*, M.R., Mr. Baron *Gilbert*, and Mr. *J. Raymond*, having heard this matter solemnly argued by counsel on both sides, gave their judgment, which was delivered by the Lord Commissioner *Jekyll*, that the Court were all of opinion the sequestration against the Countess of Shaftsbury ought to be absolute.

LORD COMMISSIONER JEKYLL.—The marriage of a ward without the consent of the guardian is a ravishment of the ward (*a*), and aggravated in this respect, that, after such ravishment by marriage, the ward cannot be restored to such condition as he was in before, it being rendered impossible by the wrong of the ravisher.

By the Statute of Westminster 2 (*b*), it is enacted that if one be guilty of ravishment, either of a male or female ward, if the ward be restored, though not married, the ravisher shall be punished with two years' imprisonment; but if the ward be not restored, or if he be restored and be married, the party guilty of such ravishment (if he cannot make satisfaction for the marriage) shall be punished by imprisonment for life, or by abjuring the realm, at the discretion of the Court where he is tried; so that a ravishment of a ward became an offence not only against the guardian, but against the king, and whereas, on the ward's being married, the ravisher was to be punished by perpetual imprisonment, or by abjuring the realm, this shows the greatness of the offence, by the grievousness of the punishment.

And the matter of marrying infants without the proper consent of guardians, is provided against, both at law and in this Court, especially the latter, it being notorious that a Court of equity entertains no greater jealousy of, nor shows more resentment against anything, than the unlawful marriage of infants.

(*a*) 2 Inst. 440.

(*b*) 13 Ed. 1, c. 35.

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In the case of a marriage of a lunatic (viz.), that of Mr. Packer's marrying Mrs. Ash (a), the Court committed Mr. Packer, the parson, and others that were their agents, and Packer continued in custody for a considerable time: and infants and lunatics may be compared together, both of these being unable to take care of themselves.

In the case where an infant is committed by the Court to the custody or care of any one, such committee gives a recognisance that the infant shall not marry without leave of the Court, which form is very rarely altered, and on special circumstances; so that, if the infant marries, though without the privity, or knowledge, or neglect of the committee, yet the recognisance is, in strictness, forfeited, whatever favour the Court upon application may think fit to show such committee, when he appears not to have been in fault (b).

In Lord *Somers's* time, Mr. Goodwin married an infant (Mrs. Knight), and was committed, and this commitment was followed by an Act of Parliament for dissolving the marriage.

So, on Sir Edward Hannes's daughter and heir, who was an infant, being inveigled from her guardian, Dr. Waugh, and married to one Willis, though Mrs. Hannes was not taken from a guardian assigned by the Court, yet, in that case, both Mr. Willis, and the parson, and the agents, were all committed by the Master of the Rolls, Sir *John Trevor*, and the order afterwards confirmed by Lord *Harcourt*.

And, as this Court punishes the instruments where such marriage is had without the consent of the guardian, so, if there be only an apprehension that the infant will be married unequally, either by the guardian or by his neglect, a court of equity will interpose, and send for the infant and commit him to the custody of a proper person, or relation, in order to prevent such danger: as was done in the case of the infant Lady Catherine Annesley, by Lord Chancellor *Harcourt*, and likewise in another case, viz., that of Mr. Vernon, of Staffordshire, by Lord *Macclesfield* (c).

But the present case is still of a higher nature, as it is the case of

(a) See *Packer v. Wyndham*, Prec. Ch. 412.

(b) See *Dr. Davis's Case*, 1 P. W. 698; but this practice has some time since been discontinued, except perhaps in the case of a female ward

being allowed to go out of the jurisdiction; *Jeffrys v. Vanteswarstwarth*, Barn. 144, 145.

(c) See *Lord Raymond's Case*, Ca. t. Talbot, 38; *Smith v. S.*, 3 Atk. 304.

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a peer of the realm, in whose education the public is interested, and where the guardianship of him is devised by a peer of the realm, viz., by the will of the late Lord Shaftsbury.

As to the objection that has been made to the order of this Court, that there are no words therein, that the infant shall not be married without the consent of the guardian :

Resp. The Court could not suppose, or foresee, that any person would marry the infant without the guardian's consent : and, for that reason, there was no express provision against it in the order ; but still this prohibition is implied, viz., that no person, without the leave of the guardian, should marry this infant ; besides, by the same reason that these words ought to be inserted, the order should likewise have provided that no person should take away or ravish this ward from the guardian, &c., all which things are surely implied : but, further, it is a sufficient answer to this objection, that such negative words are never inserted in the order.

But then it is objected, here is no disparagement in this marriage : forasmuch as the birth of the noble lady to whom Lord Shaftsbury is married, and also her quality, are equal to those of her husband ; and she has had the advantage of being educated under the Countess of Gainsborough, her mother, a lady of great honour, virtue, and quality.

Resp. Admitting all this to be so, yet it may be reasonably supposed, that if the infant earl had staid till he had attained his age, and could have made a jointure and settlement, in such case his Lordship might have had a better portion.

But, in reality, though there be no disparagement, yet this is only by way of extenuation, and can never be urged as a justification : for, it is the marriage without the consent of the guardian that constitutes the offence ; so that, such marriage having been to one of equal degree and fortune, can at most tend but to extenuate.

And it is observable, that the disparagement of the ward was not where such ward, without the guardian's consent, married one of inferior degree, as a villein, citizen, or burgess, but where the guardian himself married the ward to one of inferior degree ; for which see the Statute of Merton, cap. 6 & 7, 2 Inst. 89—92.

Object. The punishment of this ravishment of ward by sequestration, or otherwise, would be fruitless, since the marriage, having been

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once solemnised and perfected, the same cannot be afterwards rescinded or dissolved.

Resp. The like objection might be made, though the marriage were ever so much to the disparagement of the ward; but in all these cases the reason of inflicting punishments is for example's sake, and to deter others from the like offence of ravishment of wards.

Object. This marriage is by the Countess, the mother of the infant earl, who is guardian by nature and nurture, and so cannot be guilty of ravishment of ward.

Resp. The right of a testamentary guardian takes place of a guardianship by nature; by the express words of the Act of Parliament (*a*), the guardian by will takes place of all other guardians, and his authority, by that law, is a continuation of the paternal authority.

Object. There is no instance of any one case, where a complaint has been against an infant's mother, for taking away her own child.

Resp. The Lords Selkirk and Orkney, guardians of the infant Duke of Hamilton, petitioned against the Duchess of Hamilton for taking away the infant Duke out of their custody, and their complaint was received; upon which the Court would have proceeded against the mother, but the guardians could not make out their right of guardianship by reason of some defect in the instrument under which they claimed.

So, that, all these objections being answered, the Court are of opinion, that the sequestration against the Countess Dowager of Shaftsbury ought to be made absolute.

As to the case of Lady Gainsborough, that seems to differ; and here the question is, whether the Countess of Gainsborough's consenting that her daughter should be married to the infant earl, be not a contempt?

8 Edw. 3, c. 52. The case was a writ of ravishment of ward, which was brought against four men and a woman: the men took away the ward, and the woman, knowing that the four men had taken away the ward, married the ward to her daughter, upon which *Hirle*, C.J., gave the rule, that the woman was equally guilty with the four men of the ravishment of the ward, the marriage of the infant, with-

(*a*) 12 Car. 2, c. 24.

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out the consent of the guardian, constituting the offence; and though the guardian be not appointed by the Court, nor any commitment made by the Court of the infant, yet have those been punished who have married the ward without the consent of the guardian, as appears from the above cited case of Mrs. Hannes, where the case was nothing more than that of marrying the infant without the consent of the testamentary guardian, and the decree was only for an account of Sir Edward Hannes, the father's personal estate, and for an allowance of maintenance for the infant.

Whereas, in the principal case, the decree goes something further as it directs that the will of the late Earl of Shaftsbury should be performed, part of which will is, that the infant earl should be under the care and guardianship of the persons named therein.

In 3 Co. 38 (*Ratcliffe's Case*), it was resolved, that every ancestor, whether male or female, might bring an action of trespass or ravishment of ward against any one for taking away his heir-apparent, male or female, and for marrying such heir; and that it is not material of what age such heir then was; and as the ancestor might bring such action for taking away and marrying the heir, so also might the guardian for taking away and marrying the ward.

It does not appear that the late Earl of Gainsborough left any testamentary guardians of his children; so that the Countess was guardian of them by nature; the marriage of her daughter belonged to her: consequently it is to be presumed that she married her daughter to the infant earl; at least, if she did not, she may purge herself by oath.

But it is material that the Lord C. B. Eyre, the guardian of the infant earl, has not, in his petition, made out any direct charge, or prayed anything against the Countess of Gainsborough; and, possibly the Court may not be bound, *ex officio*, to punish for a ravishment of a ward where there is no complaint.

The Court has the care, but not the guardianship of infants; and the Lord C. B. Eyre is not a guardian appointed by the Court (*a*) but by the will of the father, in which respect the Court is the less concerned.

And though the stat. 12 Car. 2, c. 24, says, that a testamentary

(a) See *Goodal v. Harris*, 2 P. W. 562.

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guardian may maintain an action of ravishment of ward, if the infant be taken from him, yet the statute does not enjoin him to do it, but refers the same to the discretion of the guardian.

So that, in this case, forasmuch as the testamentary guardian has not complained of or prayed any redress against Lady Gainsborough, the Court will do nothing against her, but discharge the order of sequestration with respect to her (a).

And now we come to the petition of the infant Earl of Shaftsbury, where it is first objected, that though the Court might, upon a petition, make a provisional order for the taking care of an infant, yet that they ought not to make an order determining the right of guardianship, unless the matter be brought judicially before them by bill, answer, and proofs.

Resp. In this case here are a bill and answer, and both the will and the devise of the guardianship are set out by the bill; whereupon, the decree says, that the trust of the will shall be performed, one of which said trusts is the guardianship of the infant.

It is not material that the earl was defendant, for so it was in the case of *Mrs. Hannes*, who was married to *Mr. Willis* without the consent of the guardian: and this Court may upon petition only, without any bill or decree, make an order to determine the right of guardianship, in regard that the care of all infants is lodged in the king as *pater potestas*, and by the king this care is delegated to his Court of Chancery.

In *F. N. B. 232*, the king is bound, of common right and by the laws, to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the king's protection; for which reason it is, that idiots and lunatics, who are incapable to take care of themselves, are provided for by the king as *pater potestas*, and there is the same reason to extend this care to infants.

This is the reason given in the writ *idiotu inquirendo*, which the king issues out to take care of him who *regimini sui ipsius et honorum, et terrarum suarum minimè sufficit*, which reason also appears in the writ *de lunatico inquirendo*; and in *4 Rep. 123, b.* (*Beverley's Case*), infants, as well as idiots, are said to be under the

(a) See *Herbert's Case*, 3 P. W. 116.

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care and protection of the Crown, as persons equally unable to take care of themselves.

In like manner, in the case of charity, the king, *pro bono publico* has an original right to superintend the care thereof, so that abstracted from the statute of 43 Eliz. c. 4, relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in Chancery in the Attorney-General's name, for the establishment of charities.

Also in the case of *Lord Fulkland v. Bertie* (a), the Lord Somers, in delivering his opinion, takes notice, that several things are under the care and superintendency of the king, as he is *pater patriæ*, and instances in all charities, idiots, lunatics, and infants.

Indeed, several Acts of Parliament have made alterations in some cases of this nature, which so far stand altered, and no further: but unless there be express words in an Act of Parliament for that purpose, the original jurisdiction of this Court remains as before: but there is not any one Act that has taken away the original jurisdiction of this Court with respect to this care and superintendency in the case of infants, charities, idiots, and lunatics. Since the statute which took away the Court of Wards (b), the jurisdiction of wardship returns to the Court of Chancery (c): and it appears by the Register 21, b. 198, that a writ may issue out of this Court to remove the guardian of an infant, and to put another guardian in his stead.

The law is particularly favourable to, and careful of an infant's interest; and though the infant himself cannot bring an account against the guardian, until his coming of age, yet a third person may bring a bill for an account against the guardian, even during the minority of the infant (d).

So in all decrees against infants, even in the plainest cases, a day must be given them to show cause when they come of age.

Lord Somers has often said, that this Court should be always open for petitions; and orders on petitions, in regard to the guar-

(a) 2 Vern. 333.

77 b.

(b) Established by 32 Hen. 8, c. 46;
33 Hen. 8, c. 22. Abolished by 12
Car. 2, c. 24, s. 3. See Co. Litt. 77 a.

(c) 2 Vern. 342.

(d) See Pomfret v. Lord Wind-or, 2
V. 484.

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guardianship of infants, have not only been provisional, but in some cases decisive, as to the right of guardianship.

Thus, in the case of *Lord Tenham and Burrett (a)*, there was no bill depending in this Court, but only a petition, desiring that Lady Tenham, the mother, being a Papist, might not have the guardianship of the infant, determined on petition against the mother: upon which an appeal was brought to the House of Lords, before whom it was never objected, nor once thought of, that this Court could not, on a petition only, determine the right of guardianship: and on the appeal the Lords also determined the right against the mother.

Also in the case of a testamentary guardian, such guardian having a plain legal right upon the words of the will, and the whole case arising thereon, there can be no need of a bill in equity: no proofs of either side are requisite, or can avail; and therefore the matter is properly determinable upon a petition without a bill.

But in the last place it is objected, that, upon the wording of this will, the Lord Chief Baron has no right to the guardianship, the same being devised to him and two others, without saying, and to the survivor of them: and that this is a joint personal confidence wherewith three are intrusted, wherefore, by the death of any one, the guardianship is determined; and to prove that a guardianship is personal, it has been urged, that it is not assignable, nor will it go to executors or administrators.

Resp. I admit a guardianship is not assignable, neither will it go to executors or administrators; but for all that, it is coupled with an interest, and is not a naked authority. I admit, also, it has been said, that where a naked authority is given to two, if one dies, the survivor cannot act; but the same book, viz, 1 Inst. 112, 113, says, that where an authority is coupled with an interest, it does survive. In the case of *Gardiner v. Sheldon (b)*, the case of a guardian is compared to that of an executor or administrator, which is not assignable, but yet survives; and though a guardian be not in all respects to be compared to an executor, in regard the latter may continue his executorship, by appointing an executor by his will, yet

(a) See 9 Mod. 40; 14 Vin. Ab. p. Toml. edit.

172. note to Ca. 1; 2 Eq. Ca. Abr. 16. (b) Quere Bedell v. Constable.
nom. Reynolds v. Lady Tenham; Lady (Vaugh. 182.)
Tenham v. Lennard, 4 Bro. P. C. 302.

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the case of a guardianship devised to two is strictly like the case of an administration granted to two (especially where the debts amount to as much as the assets); for in that case, as well as in the case of two guardians, an administrator cannot assign his administratorship; it will not go to his executors or administrators, but to the surviving administrator (*a*); such an administrator is accountable to the creditor for everything, as much as the guardian is to the infant; such an administrator can make no profit.

And that a guardianship is coupled with an interest is most apparent, in that a guardian may bring an action and avow in his own name, may make leases (*b*) during the minority of the infant, and may grant copyholds (*c*) even in reversion, as *dominus pro tempore*.

A guardianship is not properly an office, nor to be resembled (for instance) to the office of a parkership: for the former has an interest in the infant's estate; but a parker has no right or interest in the park, or land inclosed therein, and the owner of the land may determine such office by disparking the park or killing the deer; and whereas in Poph. 204, it is said, that where the Lord Grey committed the custody of his son to four, and one of them died, the authority determined; this case is put upon the clause of the statute of 4 & 5 Phil. & Mar. cap. 8 (*d*), which says, "that whosoever takes a damsel unmarried, and under the age of sixteen, out of the custody of their father or mother, or any such person to whom the father in his life-time, or by his will, or by any act in his life-time, has appointed the same, shall be subject to the pain of two years' imprisonment, or to the payment of such fine as the Court shall appoint." So that, by that Act, as to this special purpose, the father might by will or deed appoint the custody of his daughter, but such appointee had not the like interest as the guardian has: he had but a bare authority.

As to *Auditor Curle's Case* (*e*), that depended upon the statute

(*a*) *Adams v. Buckland*, 2 Vern. 514; *Hudson v. H.*, Cas. t. Talbot, 127. 2 Wills. 129; *Shaw v. S.*, Vern. & Seriv. 607. See Settled Land Act, 1882, s. 60.

(*b*) 2 Roll. Abr. 41, pl. 4; but a lease by the testamentary guardians will be valid only during the minority of the ward: *Roe d. Parry v. Hodgson*,

(*c*) 2 Roll. Abr. 41, pl. 3.

(*d*) Repealed by 9 Geo. 4. c. 31.

(*e*) 11 Co. 2 b.

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of the 32 Hen. 8, c. 46; but in the principal case, when the now infant earl was so very young as not to be above a year old, and the testator had appointed him three guardians, it was hardly probable that the testator himself could imagine that all those three guardians should live until the child's age of twenty-one; and then to say, that the guardianship shall determine by the death of any one of the guardians, would be to affirm, that the more care the father takes of the child's education, the less it shall profit the child, because by the death of any one of these guardians the child shall be without a guardian, and the more of them were appointed by the father, the less likelihood there would be that they all should live till the child arrive to twenty-one.

LORD COMMISSIONER GILBERT.— * * * (a) In this case there have been four questions made.* *

1st Question.—First, Whether the Court has jurisdiction?

Now, touching the wardship at law, there was a two-fold jurisdiction.

The first was, when the tenures were in being; and there, till the Court of Wards was erected, the whole jurisdiction of the king's wards where the lands were held in chivalry, was under the jurisdiction of this Court.

So likewise, in relation to subjects, this Court determined touching the wardships of the body, who was the prior, and who was the posterior lord.

For the wardship of the body of the heir went to the lord who had the prior homage: and that was determined in the Court of Chancery, where several lords applied for the writ of ravishment, which was an original writ.

But this sort of guardianship was a sort of dominion of masters over servants and vassals, and was introduced among the Gothic nations, to breed them to arms: and it was a great burthen upon the people, and is fallen now with the tenures.

But the Crown has another jurisdiction, and that is as *pater patriæ*, as a father over his children.

The king has a right to take care of infants, lunatics, and idiots,

(a) For the full judgment of Lord v. S. (see Gilb. Eq. Rep. 172), and for Commissioner Gilbert, see Shaftsbury the shorter note of it see P. W.

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that cannot take care of themselves; and this care cannot be exercised otherwise than by appointing them proper curators or committees. [The Lord Commissioner then referred on this point to *Fleta*, cap. 9, fol. 4, *de Tutelis*; to *Bracton*, lib. 2, cap. 38, fol. 86; to *Staunford*, in his *Exposition of the King's Prerogative*, p. 37, to *Beverley's Case* (a); and to *Falkland v. Bertie* (b).]

There are since innumerable precedents, wherein this Court has determined touching the guardianship of infants, as in the case of *Freeman* and *The Bishop of Oxford*, the 5th of July, 1719, where the Bishop of Exeter, surviving guardian to the father's will, applies to the Court, and the infant is sent from Oxford to Cambridge.

And in *Vernon and Vernon's Case* (c), several orders were made upon petition, and among the rest, one upon petition, that the infant was conversant with the daughter of the guardian, that he should be immediately sent for, and ordered forthwith to Eton School.

And in *Anesley and Anesley's Case* (d), it was ordered to take the infant from the mother, and a sequestration against the Duke of Buckingham and the mother for not producing the infant.

Now, as the king has the protection of infants, I don't see any other protection can be than by assigning them their guardians: and where should that protection be exercised but in that Court where care is taken of all persons under natural disabilities? * * *

2nd Question.—The second question is, whether the Court can declare the right of guardianship by petition, or whether it must be by bill? * * * (e).

3rd Question.—The third question is, whether this be a legal declaration of the right of guardianship; that is to say, whether it will survive or not? And here it has been argued, that the guardianship is a naked authority, and so cannot survive.

But 'tis agreed, that if it be an authority coupled with an interest it will survive.

Indeed, in the civil law they looked upon it to be a naked authority; but yet, where there were several guardians, and one only gave security, it was executed by him alone. See *Vinius*, tit. 24, *De Satisfactione Tutor et Curator*.

(a) 4 Rep. 126.

(b) 2 Vern. 333.

(c) 10 Geo. 1, cited 1 V. jun. 456.

(d) Cited Ridg. 149; 8 Mod. 214.

(e) See now Rules of the Supreme Court, 1883, O. 25, r. 5; O. 55, rr. 25, 26.

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But if it were an authority, it is not like an authority to do a single act where it must be done by them all, because it is the will of the party that authorises them all, and so one alone can't execute it.

But in this case the authority must, from the nature of the thing, be joint and several; for one alone must receive the money of the infant, and not meet altogether for that purpose.

And were it an authority, or were it not, it is to be construed joint and several; else the more guardians were appointed for the security of the infant, he would be the less secure, because upon the death of any one of them the guardianship would be at an end.

But no doubt, with us, it must be reckoned an interest.

For the law has appointed remedies, both droitural and possessory, to recover the guardianship.

First, Droitural.—And that was the writ *de custodia terre et heredis*; and Fitzherbert has compared the droitural and possessory action, in the title *De Custodia Terre et Heredis*, fol. 133.

The Statute of Merton, c. 6, provideth, that, in the writ of right of ward, the plaintiff shall recover the value of the marriage.

Secondly, Possessory.—And that, at common law, was the action of trespass; and in this, at common law, he could only recover damages for his ward, and not the ward itself.

The Statute of Westminster 2 (a), gives a writ of ravishment of ward, in which the plaintiff recovered the body of the heir, and not damages only.

And by the Equity of Westminster 2 (b), a writ of ravishment lay for the guardian in socage, as a writ *in consimili casu*.

Everyone will allow the guardian in chivalry had an interest; and if the guardian in socage would have the writ *in consimili casu*, he must have an interest also.

And a man may as well have an interest of honour, which every person has in relation to his family, as an interest of profit.

And it appears, in *Ratcliffe's Case* (c), that the father had an action of trespass for taking away his son and heir *quare filium et heredem rapuit*, though he was not in propriety of speech counted the guardian; for the heir was looked upon as part of the family.

(a) 13 Ed. 1, c. 35.

(c) 3 Co. 37.

(b) 13 Ed. 1, c. 24.

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But the father, however, had an interest in the son, and so it was trespass to take him away.

But the father had not a writ *de custodiâ terre et heredis*, because the father was no guardian. Nor was there any need of a *droitural* action, because he was always in possession of his son; and so an action of trespass lies for the marrying his heir apparent, whether he be within age or of full age, because it is an injury to marry and destroy the hopes of his family by an improvident marriage (*a*).

And this lies even against the lord, for the father had the custody against the lord: for the father, being tenant in chivalry, could breed his son to arms; but no collateral ancestor had the custody against the lord.

And, therefore, this makes the difference that is mentioned in *Rutcliffe's Case* (*b*), that a collateral ancestor may have a writ of ravishment against any person that ravishes *consanguineum et heredem*; (that is) his heir apparent, because that is an injury to himself.

But the action does not lie against the feudal lord, because he has a right to marry him.

And every man may be said to have an interest in his heir apparent, because nothing imports him more than to continue his name in proper representatives.

But the father at common law could not appoint a guardian, because the law had appointed a guardian, whether the father was tenant in chivalry or in socage.

The first law that gave the father the power of appointing was 4 & 5 Phil. & Mar. c. 8 (*c*). The words of the statute are, "that nobody shall take away any maid or woman-child unmarried, being within the age of sixteen years, out or from the possession, custody, or governance, and against the will of the father of such maid or woman-child, or of such person or persons to whom the father of such maid or woman-child, by his last will and testament or by any other act in his lifetime, hath or shall appoint, assign bequeath give, or

(*a*) Fitz. Abr. tit. Garde, 32.

(*b*) 3 Co. 37.

(*c*) Repealed as to England by 9

Geo. 4, c. 31, s. 1. As to India, by 9

Geo. 4, c. 71, s. 125.

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grant the order, keeping, education, or governance of such maid or woman-child."

This gives authority to appoint the custody of a female child for a special purpose. He that takes away the female child, and marries her or deflowers her, is an offender within that statute.

So, this being a custody for a special purpose, it was properly enough construed to be a naked authority.

Therefore I take the case in Poph. 204, to be good law, that, when two persons are appointed guardians by authority of this statute, and one of them dies, it will not survive, because that statute gives an authority to a special purpose, to make the ravisher criminal within that law.

But the 12 Car. 2, c. 24, gave the father a power, by deed executed in writing, or by act executed in his lifetime, or by his last will and testament, to appoint the custody and tuition of his child or children till the age of twenty-one years; and such disposition of the custody to be as good and effectual against all and every person claiming the custody of such child or children as guardians in socage or otherwise, and the persons to whom such custody shall be disposed, to have a writ of ravishment of ward or trespass.

This statute was formed by Sir *Matthew Hale*, and, when wardships were taken away, introduced the testamentary guardians; and this testamentary guardian, by the rules of the civil law, was to take place before all others.

But our testamentary guardian is not a naked authority, but is made after the model of a guardian in socage, and, by consequence, an interest passes to the guardian.

And the Act (Rights), given to the guardian in socage, are given by this law.

But 'tis said, that every interest is assignable, transferable, or devisable, and that the guardianship is not; and therefore it is a naked authority and not an interest.

Every interest of profit is assignable, because it is the nature of property, that the person who is the owner should have dominion over it, so as to assign or transfer it.

But the guardian in socage has no interest of profit: it is an interest of honour, and for the honour of the family committed to his

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next of kin, and therefore is inherent to the blood, and can't be assignable.

Because a stranger could not have that interest to take care of the ward, nor have it at heart.

The guardian in socage was accountable to the infant when he came to the age of fourteen, and he could not transfer that account to another.

The testamentary guardian, as is said, is formed after the manner of guardian in socage, and comes instead of him, and is *in loco parentis*.

Therefore, though it be not assignable, nor transferable, yet it is such an interest as shall survive.

4th Question, Contempt of the Court.—The fourth question is, whether the ladies, or either of them, are in contempt of the Court?

And it is very plainly sworn upon the Lady Shaftsbury, that she has owned that she has seen him married and bedded.

The mother's being present in this case, is a plain evidence of assent.

And the mother can't marry her child without the consent of the testamentary guardian.

For the father, who had the power over his child by law, has placed it under the power of the testamentary guardian.

Therefore it is taken out of the power of the mother.

But it is objected, that this Lord Shaftsbury has married the Lady Susannah Noel, a lady of birth, quality, and fortune, and therefore is married without disparagement, and that this will be no contempt of the Court.

When the ward is put under the protection of this Court by the testamentary guardian, it is a contempt of the Court to marry him without the consent of the guardian.

It is a breach of filial duty for children to marry without the consent of the parent.

The testamentary guardian is *in loco parentis*, and he having put the ward under the protection of the Court, it is then a contempt to marry him without the guardian's consent, and the contempt being in marrying him without the consent of the guardian, an improvident marriage is only an aggravation of the offence, if that had been the case.

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There is nothing in the objection, that the mother has the natural power over her son, and that *jura sanguinis nulla lege civili possunt dirimi*.

For the father, whilst living was the head of the family: he had power over his child, and he might dispose of him by law. And it is the duty even of the mother to pay that respect to the memory of her deceased husband, as not to marry her son without the consent of the guardian appointed by the father.

And when the child is by the guardian put under the protection of this Court, it will be a contempt even of the mother to marry him without the consent of the guardian.

As to the Lady Gainsborough, this contempt is not sworn upon her.

For an order for sequestration in the case of a peer, or a commitment in the case of a common person, is a judicial act of the Court, and therefore must be founded on a proper affidavit, as I apprehend.

The order is the judgment of the Court, the sequestration or commitment is but the execution of it.

And therefore the judgment is to be founded upon truth, and not upon conjecture only.

For if she be examined upon subsequent interrogatories, this will not make good the determination of the Court by a matter *ex post facto*.

Wherefore he agreed with Lord *Jekyll in toto*, as did also Lord Commissioner *Raymond (a)*.

NOTES.

1. Generally, p. 495.
2. Guardianship by Nature and Nurture, p. 495.
3. Wards of Court, p. 499.
4. Testamentary Guardians, p. 509.
5. Jurisdiction of Court, p. 514.
6. Custody, p. 525.
7. Foreign Guardians, &c., p. 530.
8. Powers under Statutes, p. 531.

(a) See 2 P. W. 125.

Eyre v. Countess of Shaftsbury.**1. Generally.**

The jurisdiction of the Court of Chancery over infants probably resulted from the right of the Crown over the persons and property of infants as *parens patrie* where they have no other guardian. This jurisdiction was exercised by the Chancellor, as a part of the general delegation of the authority of the Crown, *virtute officii* (*a*), and whatever may be its origin it is now firmly established, and it is a settled maxim that the Crown is the universal guardian of infants and of their property (*b*).

Under the Judicature Act, 1873, s. 34, subs. 3, all causes and matters relating to "the wardship of infants and the care of infants' estates" are assigned to the Chancery Division of the High Court, and by sect. 25, subs. 10, of the same Act, "in questions relating to the custody and education of infants the rules of equity shall prevail" (*c*). But the jurisdiction of the Chancery Division is concurrent with that of each of the other Divisions of the Supreme Court (*d*), and extends to infants who are not wards of court and who have no property (*e*), although the Court cannot interfere with regard to the maintenance or education of infants, unless it has some means of providing for them (*f*); and it also extends over the whole period of infancy (*g*).

2. Guardianship by Nature and Nurture.

Rights of Father.—Passing over the different species of guardianships discussed in the principal case, some of which have been either abolished by statute, have fallen into disuse, or have become of little practical importance, such as guardianship in chivalry, guardianship in socage, guardianship by custom, guardianship by the appointment of the spiritual Courts, guardianship by election, and guardian-

(*a*) See *Re Spence*, 2 Ph. 247; *Reg. v. Gyngall*, (1893) 2 Q. B. p. 246; *Thomasset v. T.*, (1894) P. p. 390; and also *Wellesley v. W.*, 2 Bligh, 136; Co. Litt. 89 a.; Hargrave's note (70); 2 Fonbl. Eq. 224; Story, Eq. (1892) p. 910; Simpson, Infants (1890), p. 146.

(*b*) *Wellesley v. Beaufort*, 2 Russ. 19; *Beaufort v. Bert*, 1 P. W. 702-796; *Reg. v. Gyngall*, *supra*.

(*c*) See judgment of Kay, L.J., in *Reg. v. Gyngall*, (1893) 2 Q. B. p. 248; *Thomasset v. T.*, (1894) P. p. 299; *Barnardo v. McHugh*, (1891) A. C. 398.

(*d*) *Re Goldsworthy*, 2 Q. B. D. 75; *Re Ethel Brown*, 13 Q. B. 14. 614; *Re Agar-Ellis*, 24 C. D. 317; *Thomasset v. T.*, (1894) P. 295, overruling *Blandford v. B.*, (1892) P. 148.

(*e*) *Re MacGrath*, (1893) 1 Ch. 143, C. A.; and see *Re Fynn*, 2 De G. & Sin. p. 481; *Re Spence*, 2 Ph. 247; *Wellesley v. Beaufort*, 2 Russ. p. 20.

(*f*) See *Re Agar-Ellis*, 24 C. D. p. 332; *Re MacGrath*, *supra*; *Thomasset v. T.*, *supra*; *Wellesley v. Beaufort*, 2 Russ. p. 21.

(*g*) *Thomasset v. T.*, *supra*.

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ship under stat. 4 & 5 Phil. & Mar. c. 8 (*a*), it may be laid down as indisputable law that the father is by nature and nurture the guardian of his legitimate children, though wards of Court, and is entitled to their custody and control until they are twenty-one years of age (*b*). And he may delegate part of his authority during his life to the tutor of his child, who is then *in loco parentis* (*c*).

"The strict common law gave to the father the guardianship of his children during the age of nurture and until the *age of discretion* (*d*). The limit was fixed at fourteen years in the case of a boy and sixteen years in the case of a girl, but beyond this * * * the father had no actual guardianship except only in the case of the heir apparent, in which case he was guardian by nature till twenty-one * * * But for a great number of years the term 'guardian by nature' has not been confined, so far as the father is concerned, to the case of heirs apparent, but has been used on the contrary to denote that sort of guardianship which the ordinary law of nature entrusts to the father, *until the age of infancy has completely passed and gone* (*e*)."

The father has the right to determine questions relating to the education and religious training of his child (*f*), and the child must, though the father has died without leaving any directions, be brought up in the father's religion (*g*), except where the welfare of the infant requires the rule to be disregarded, as where it is of sufficient age to have received and formed, and has received and formed, other religious impressions (*h*); and neither the Guardianship of Infants Act, 1856 (*i*), nor the Poor Law Act, 1889, affect

(*a*) See the notes of Mr. Hargraves, Co. Litt. 88 b., and Simpson on Infants (1890), p. 206.

(*b*) See judgment of Brett and Bowen, L.JJ., *Re Agar-Ellis*, 24 C. D. pp. 326 and 336.

(*c*) Simpson, Infants (1890), p. 120.

(*d*) See further as to this, Reg. v. Gyngall, (1893) pp. 250, 251; *Re Agar-Ellis*, 24 C. D. p. 326; *Thomasset v. T.*, *infra*; Reg. v. Lewis, 9 Times Rep. 226.

(*e*) Per Bowen, L.J., *ibid.* p. 335; and see *Re Salisbury*, 2 C. D. p. 31; *Wood v. Pemberton*, 6 C. D. 19; *Smart v. S.*, (1892) A. C. 425; *Ex p. Hopkins*, 3 P. W. 152, 154; *Stileman v. Ashdown*, 2 Atk. 480; *Wollesley v. Beaufort*, 2 Russ. 21; *De Manneville*

v. De M., 10 V. 52, 62; *Thomasset v. T.* (1894) P. p. 298.

(*f*) As to religion, see especially *Re McGrath*, (1893) 1 Ch. p. 148; *Re Newton*, (1896) 1 Ch. 740, *infra*, p. 519; *Re Clarke*, 21 C. D. 821; *Re Montagu*, 28 C. D. 82; *Re Nevin*, (1891) 2 Ch. 209; *Re Scanlon*, 40 C. D. 200; *Re White*, 9 Times Rep. 575; *Re Agar-Ellis*, 10 C. D. 49, 24 C. D. 317, C. A.

(*g*) *Talbot v. Shrewsbury*, 4 Mv. & C. 672; *Re North*, 8 L. T. 309; *Hawksworth v. H.*, 6 Ch. p. 542; *Re Montagu*, 28 C. D. 82.

(*h*) *Re McGrath*, *Re Newton*, *supra*; *Re Besant*, 11 C. D. p. 519, C. A. See Part 5, p. 514.

(*i*) See *Re Scanlon*, 40 C. D. 200.

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this rule (*a*). A father cannot release this right (*b*) nor bind himself to exercise it in a particular way (*c*), but after his death circumstances may arise which may lead the Court to consider whether the right has not been waived (*d*).

As against their mother he may place the children with another person (*e*), or put restrictions on their intercourse with their mother in a proper case, as where he believes that in the absence of such restrictions she would alienate their affection from himself (*f*), even when he is himself abroad (*g*), except where his paternal authority is controlled by the Court (*h*).

The father, moreover, is entitled to judge not only what is for his children's benefit as regards the guardianship of their persons but also of their estates: it has been held, therefore, that he is ordinarily assuming that he has no interests hostile to the children, and has been guilty of no neglect or default, the proper person to conduct a suit on their behalf as next friend (*i*); and if the father be dead the nearest paternal relations are entitled to nominate the next friend (*k*).

Where a person confers a benefit upon the father or upon the children for their maintenance, or otherwise, upon condition that the father give up the guardianship of them if he accepts the benefit himself or commits the care of his children to the guardian nominated by the stranger, he will not be allowed afterwards to prejudice their interests by asserting his legal right, either by interfering with their education or enforcing the delivery up to him of their persons (*l*). Although a father can, before it is acted upon, rescind and abandon an agreement by which he has given up the custody of his child to a third person (*m*), yet if it could not be revoked without injuriously

(*a*) See the Poor Law Act, 1889, 52 & 53 Vict. c. 56, s. 1, s.s. 6; and Simpson on Infants (1890), p. 131, note (*k*); and cf. the Custody of Children Act, 1891, s. 4, p. 533, *infra*.

(*b*) *Andrews v. Salt*, 8 Ch. 636; *The Queen v. Barnardo*, 23 Q. B. D. p. 310.

(*c*) *Ibid.* and *Re Meades*, Ir. L. R. 5 Eq. 98.

(*d*) *Re Clarke*, 21 C. D. p. 825.

(*e*) *Ex p. McClellan*, 1 Dowl. 81; *Ex p. Glover*, 4 Dowl. 291; *Ex p. Skinner*, 9 Moore, 278.

(*f*) *Re Agar-Ellis*, 24 C. D. 317.

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(*g*) *Re Emily Suttor*, 2 Post. & Fin. 267.

(*h*) Part 5, p. 314, *infra*.

(*i*) *Woollf v. Pemberton*, 6 C. D. 19, 22, 23.

(*j*) *Talbot v. T.*, 17 Eq. 347.

(*l*) *Colston v. Morris*, Jac. 227, n.; *Potts v. Norton*, 2 P. W. 109, n.; *Blake v. B.*, Amb. 306; *Powell v. Cleaver*, 2 Bro. Ch. 499; see also *Lyons v. Blenkin*, Jac. 24; *Andrews v. Salt*, 8 Ch. App. 622; *Faouani v. Selwyn*, Jac. 268, n.

(*m*) *Hill v. Gomme*, 1 B. 540.

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affecting the interests of the child the father has been restrained from exercising the rights which at law he undoubtedly retained (*a*). But the Court will not deprive a father of the custody of his children merely because a person makes an offer to maintain them, even although it might be for the benefit of the children that such offer be acceded to (*b*).

Before the Custody of Infants Act (*c*) an agreement by a father to give up to his wife the custody and education of their children, was contrary to public policy, and would not be enforced in equity against the husband, even although he might have been guilty of adultery and cruelty to his wife (*d*): unless he had been guilty of such gross misconduct as totally to unfit him to have the custody and control of his children, as for instance, where he had criminally assaulted a daughter (*e*), but the law upon this subject was altered by sect. 2 of the last mentioned Act.

The Court will not interfere with what has been well termed the "sacred right" of a father over his children (*f*), except under the circumstances mentioned in Part 5, p. 514, *infra*.

Rights of Mother.—The father's right at common law to the control and custody of his legitimate children is subject to the paramount consideration of their welfare (*g*), absolute as against the mother (*h*). If the father appointed testamentary guardians the mother had no right to interfere with them (*i*): but if no such guardian were appointed by the father, then the mother became guardian by nature and nurture (*k*).

And her right to the custody of her infant child is not lost by her allowing him to remain in a charitable institution for a little over a

(*a*) *Reg. v. Smith*, 22 L. J. Q. B. 117.

(*b*) *Anon.*, Jac. 264; *Re Fynn*, 2 De G. & Sm. 457; *Clavering v. Ellison*, 3 Drew. 451.

(*c*) 36 & 37 Vict. c. 12, s. 2, *infra*, p. 531.

(*d*) *Hopo v. H.*, 8 De G. M. & G. 731; *Vansittart v. V.*, 2 De G. & J. 249. See further *Hamilton v. Hector*, 6 Ch. 701; *Walrond v. W.*, 1 Johns. 18; *Re Matthews*, 26 B. 463.

(*e*) *Swift v. S.*, 34 B. 266.

(*f*) *Re Plomley*, 47 L. T. (N. S.) 281, approved *Re Agar-Ellis*, 24 C. D. pp. 328-329.

(*g*) *Re Thomasset*, (1894) P. p. 300.

(*h*) *Ex p. Skinner*, 9 Moore, 278;

Ex p. Bartlett, 2 Coll. 661; *Re Thomas*, 22 L. J. Ch. 275; *Simpson on Infants* (1890), p. 120.

(*i*) *Reynolds v. Teynham*, 4 Bro. P. C. 302; but see now *Guardianship of Infants Act*, 1886, s. 2, *infra*, p. 531.

(*k*) *Villareal v. Mellish*, 2 Swans. 533; *Mellish v. De Costa*, 2 Atk. 14; *Roach v. Garvan*, 1 V. 158; *Mendes v. M.*, 1 V. 91; *The Queen v. Clarke*, *Re Alicia Race*, 7 Ell. & Bl. 186; *Re Moore*, 11 Ir. C. L. 1; and see *Re D'Arcys*, *Ib.*, p. 298; see the *Guardianship of Infants Act*, 1886, s. 3, *infra*, p. 532.

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year (*a*). But if a wife is divorced for adultery, she, by sect. 35 of the Divorce Act (*b*), may, at the discretion of the Court, be deprived of the custody of, and of access to, her children (*c*); and the discretion of the Court may be exercised after decree (*d*).

If the child is illegitimate the mother has a *prima facie*, not an absolute right (*e*), to its custody up to the age of fourteen in preference to the reputed father, or any other person (*f*), and this right must be recognised, unless there are strong grounds for displacing her (*g*).

3. Wards of Court.

1. *Generally.*—The term “ward of Court” is used to express either that a person is under the care of a guardian appointed by the Court, or that an infant is under the care of the Court of Chancery by reason of such infant being either actually a party to an action in which the property of the infant is being administered, or being in the position of a party (*h*).

An order made on summons, or petition for a guardian (*i*); or for maintenance (*k*); or payment into Court of the fund of an infant under the Trustee Relief Act (*l*); or money paid to the separate account of an infant in an administration action to which the infant was not a party will make the infant a ward of court (*m*). But the jurisdiction exists from the fact that the infant is a British subject and not from the fact of there being property under control of the Court (*n*); therefore where such an infant is an alien, the Court on a petition by the infant alien for payment out will not require a settlement, but will

(*a*) Reg. v. Barnardo, 23 Q. B. D. p. 310; 24 Q. B. D. 283.

(*b*) 20 & 21 Vict. c. 85.

(*c*) Handley v. H., (1891) P. 124; Witt v. W., ib., p. 163.

(*d*) Manders v. M., 7 Times L. R. 142.

(*e*) Re Ulloe, 53 L. T. 711; 54 L. T. 286; Barnardo v. McHugh, infra.

(*f*) Barnardo v. McHugh, (1891) A. C. 388; Re White, 10 L. T. 349; Reg. v. Nash, 10 Q. B. D. 454; Re Taylor, 4 C. D. 157; Seton (1893), p. 879.

(*g*) Re Carey, 10 Q. B. D. 454; The Guardians of St. Mary Abbott's, 4 Times L. R. 63; Reg. v. Bolton Union,

36 Sol. Jo. 255; Reg. v. Lewis, 9 Times L. R. 226; Ex p. Emerson, 11 Times Rep. 218; and see the Custody of Children Act, 1891, infra.

(*h*) Marquis of Bute, 9 H. L. C. 440; Brown v. Collins, 25 C. D. 60; Gynn v. Gilbard, 1 Dr. & Sm. 356; Re Leigh, 40 C. D. 290.

(*i*) Stuart v. Bute, 9 H. L. C. 440.

(*k*) Re Graham, 10 Eq. 530.

(*l*) Re Bonand, 16 W. R. 538.

(*m*) De Pereda v. De Mancha, 19 C. D. 451, but see Brown v. Collins, 25 C. D. p. 62.

(*n*) Brown v. Collins, supra; Re McGrath, (1893) 1 Ch. 143.

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pay it to the person proved to be entitled to receive it according to foreign law (*a*). Although the Court has a discretion in the matter (*b*).

But payment in of an infant's legacy under the Legacy Duty Act (*c*), or of purchase-money under the Lands Clauses Act, belonging to an infant (*d*), or an order approving a settlement under Infant Settlements Act (*e*), does not constitute the infant a ward of court (*e*), nor does an order under the Divorce Act, 1857, s. 35 (*f*).

Taking Ward out of the Jurisdiction.—See p. 523.

2. *Marriage of Ward, &c.*—A male infant may contract marriage at 14, a female at 12 (*g*).—Under the Marriage Acts (*h*), the consent to the marriage of an infant must be given by the father, or if he be dead, by the guardians or one of them, and if there be none, by the mother if unmarried, and if not by the guardians appointed by the Court of Chancery or one of them, and such consent is required for the marriage of such a party so under age, unless there be no person authorised to give such consent (*i*).

And although the infant has no property, a guardian for the purpose of giving consent may be appointed by the Court of Chancery on petition, as where the father and mother are dead and there is no guardian (*k*), or if the father, guardian, or mother be *non compos* or beyond seas, or unreasonably refuse to consent to the marriage (*l*). When a marriage takes place, the law presumes that it was with due consent till the contrary appear (*m*), and after a considerable lapse of time a presumption arises that consent has been given. That presumption, however, may be rebutted by evidence to the contrary (*n*). It is to be noticed that the consent required by sect. 16 of 4 Geo. 4, c. 76, is directory merely, and a marriage without such consent is valid (*o*).

As to the penalties in the case of the marriage of persons under age without proper consent when the licence or the publication of

(*a*) *Brown v. Collins*, 25 C. D. 56.

(*b*) *Ibid.* and *Hope v. H.*, 4 De G. M. & G. 328, 341.

(*c*) *Re Hillary*, 2 Dr. & S. 461.

(*d*) *Re Wilts. &c. R. Co.*, 2 Dr. & S. 552.

(*e*) *Re Strong*, 26 L. J. Ch. 64.

(*f*) *Hyde v. H.*, 13 P. D. 166.

(*g*) *Simpson* (1890), 87; 2 Steph. Com. p. 241.

(*h*) 4 Geo. 4, c. 76, and 6 & 7 Will. 4, c. 85; *Simpson* (1890), p. 123.

(*i*) See s. 16.

(*k*) *Re Woolcombe*, 1 Madd. 213; *Ex p. Becher*, 1 Bro. Ch. 556.

(*l*) 4 Geo. 4, c. 76, s. 17.

(*m*) *Balfour v. Carpenter*, 1 Phill. Ecc. R. 221; *Osborne v. Goldham, Selby v. S.*, *Ib.* 223.

(*n*) *Harrison v. Mayor of Southampton*, 22 L. J. Ch. (N. S.) 722.

(*o*) *Reg. v. Birmingham*, 8 B. & C. 29, 2 Man. & Ry. 230.

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the banns has been procured by false swearing or fraud, see 4 Geo. 4. c. 76, ss. 23, 24. As to the same penalties being extended by the Marriage and Registration Amendment Act, 1856 (*a*); in the case of a marriage before a registrar had by means of any false declaration, notice, or certificate (*b*). Where the infant is not a ward of Court, the Court can do nothing unless jurisdiction be given it by an application before marriage (*c*).

In the case of *wards of Court*, even when they have parents living, or guardians, it is necessary to apply to the Court for leave for them to marry, which will only be granted upon its appearing that the marriage is suitable as to age and rank, and that the settlement proposed is proper (*d*). The Court will prevent a clandestine marriage, by ordering that the ward shall not be married without leave of the Court and that the person desirous of marrying the ward shall not have access, by letter or otherwise (*e*). It will likewise restrain the guardian or father from allowing the marriage to take place (*f*).

If the Court considers the proposed marriage unsuitable, it makes no difference that the guardian has given his consent (*g*) or *scilicet* the father either (*h*). It is the duty of a guardian to prevent an unfitting marriage (*i*), and if he connives at such a marriage the Court will commit the ward to the care of others (*k*).

Formerly there was a disinclination on the part of the Court to sanction the marriage of an infant ward, where it was impossible for him by reason of his infancy to settle his real estate so as to go along with his title, and to make a provision for his younger children (*l*).

(*a*) 19 & 20 Vict. c. 119.

(*b*) 19 & 20 Vict. c. 119, s. 19. As to Quakers and Jews, 19 & 20 Vict. c. 119, s. 21; 23 Vict. c. 18, s. 2. As to marriage of British subjects resident in foreign countries, see 55 & 56 Vict. c. 23.

(*c*) Simpson, *Infants* (1890), p. 349.

(*d*) *Smith v. S.*, 3 Atk. 305; *The Earl of Plymouth v. Lewis*, 2 Dick. 861; *Wellesley v. The Duke of Beaufort*, 2 Russ. 29; Simpson (1890), p. 333.

(*e*) *Seton* (1896), p. 894, form 9 and note; *Pearce v. Crutchfield*, 14 V. 206; *Smith v. S.*, 3 Atk. 304; *Goodall v. Harris*, 2 P. W. 360; *Warter v. Yorke*, 19 V. 451; *Dawson v. Thomp-*

son, 12 L. T. (N. S.) 178.

(*f*) *Lord Raymond's Case*, Cas. t. Talbot, 58.

(*g*) *Gordon v. Irwin*, 4 Bro. P. C. 355.

(*h*) Per *Eldon, C.*, *Wellesley v. Beaufort*, 2 Russ., p. 29; and see *Beard v. Travers*, 1 V. 313.

(*i*) *Baker v. Taylor*, 1 C. & P. 101.

(*k*) See *Vernon v. V.*, cited p. 489, *supra*; *Toombes v. Elers*, 1 Dick. 88; *Lord Shipbrook v. Lord Hinchinbrook*, Dick. 547; *Foster v. Denny*, 2 Ch. C. 237; *Roach v. Garvan*, 1 V. 157, 1 Dick. 88; *Smith v. S.*, 3 Atk. 307.

(*l*) *Honywood v. H.*, 20 B. 151.

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Infants, however, are now enabled (*a*), with the approbation of the Court, to make binding settlements, or contracts for settlement, of their real and personal estate (*b*) upon or in contemplation of marriage, which have the same effect as if the infants were then twenty-one, but this enactment does not extend to powers of which it is expressly declared that they shall not be exercised by an infant (sect. 1) (*c*). A ward of Court cannot be compelled to make a marriage settlement of his property (*d*). The death of an infant tenant in tail under twenty-one avoids any appointment or disentailing assurance executed under the Act (*e*). The sanction of the Court to any settlement or contract for a settlement may be given upon an application in chambers by the infant or guardian (*f*); and if there be no guardian, the Court may require one to be appointed or not as it shall think fit; and also may require any persons interested, or appearing to be interested, to be served with notice of such application (sect. 3); but the Act is not applicable to any male infant under the age of twenty years, or to any female infant under the age of seventeen years (sect. 4).

The Act extends to a post-nuptial settlement if the infant is a ward of Court (*g*). It is doubtful whether there is jurisdiction to direct a settlement under the Act after an infant, married under twenty or seventeen, has attained that age (*h*). Although in *Phillips v. P.* (*i*), *Chitty, J.*, directed a settlement under those circumstances.

As a petition under the Act does not make the infant a ward of Court (*k*), the Court does not inquire into the propriety of the marriage, but only as to what is the proper settlement to be made thereon (*l*).

It has been held that the Court in the case of an infant *not a ward* of the Court, has no power under the Act, to direct a post-

(*a*) The Infants' Settlement Act (18 & 19 Vict. c. 43), extended to Ireland by 23 & 24 Vict. c. 83.

(*b*) *Moore v. Johnson*, (1891) 3 Ch. 48.

(*c*) *Re Dalton*, 25 L. J. Ch. 751; *Re Catherine Strong*, 26 L. J. Ch. 64.

(*d*) *Leigh v. L.*, 40 C. D. 290; *Seaton v. S.*, 13 App. Cas. 61.

(*e*) Sect. 2; *Scott v. Hanbury*, (1891) 1 Ch. 298; see *Re Armit*, 5 Ir. R. Eq. 352.

(*f*) R. S. C. 1883, O. 55, r. 2 (10). The Act requires a petition, *Pearett v.*

Marriott, W. N. (1866) 48.

(*g*) *Powell v. Oakley*, 34 B. 575; *Re Sampson and Wall*, 25 C. D. 482. But cf. judgment of *Cotton, L.J.*, in *Leigh v. L.*, *infra*, and cf. *Seaton v. S.*, *infra*.

(*h*) *Seaton v. S.*, 13 App. Cas. 61; *Leigh v. L.*, 40 C. D. 290.

(*i*) 34 C. D. 467.

(*k*) *Ex p. Dalton*, 3 Sm. & G. 331, 6 De G. M. & G. 201, 205; *Re Strong*, 26 L. J. Ch. 64.

(*l*) See *Re Strong*, 5 W. R. 107; *Re Smith*, 22 W. R. 294.

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nuptial settlement on the infant who had married after attaining the age at which she was capable of contracting marriage (*a*).

An infant's marriage contract does not come within the Infants' Relief Act, 1874, and is voidable and not void (*b*). But a sum to which the infant is entitled on her marriage by virtue of the Married Women's Property Act is nevertheless bound by the settlement, although the infant avoid it on attaining twenty-one (*c*).

For orders on marriages and settlement of infants' property, see Seton (1893), 891. As to the evidence required on applications under this Act, see R. S. C. (1883), Ord. LV. r. 26.

The person who, although an infant (*d*), marries a ward of the Court without obtaining leave, and also those who contrive or assist at the marriage as abettors, including the clergyman, are guilty of a contempt of Court, and may be committed to close confinement in prison (*e*); and if they be peers or peeresses a sequestration will be ordered against them, as was the case against the Countess of Shaftsbury in the principal case, and proceedings have been stayed in a suit by a person who has married a ward of the Court and would not appear (*f*); and the contempt is equally great, although the father of the ward be alive (*g*), and whether the marriage be valid or invalid (*h*). "I do not admit," says Lord *Eldon*, "that, as there is no marriage, there is no contempt. The endeavour to marry is a contempt" (*i*).

For orders committing husband and abettors, see Seton (1893), 896—900.

If it is doubtful whether a marriage is valid or not, an inquiry upon that subject will be directed, and all intercourse will in the

(*a*) *Re Potter*, 7 Eq. 484, and see *Wortham v. Pemberton*, 1 De G. & Sm. 644.

(*b*) *Duncan v. Dixon*, 44 C. D. 211.

(*c*) *Stevens v. Trevor - Garrick*, (1893) 2 Ch. 307; *Hancock v. H.*, 38 C. D. 78.

(*d*) *Edos v. Brereton*, West., Cas. t. Hardw. 348.

(*e*) *Herbert's Case*, 3 P. W. 116; *Hill v. Turner*, 1 Atk. 515; *More v. M.*, 2 Atk. 157; *Butler v. Freeman*, Amb. 301; *Stevens v. Savage*, 1 V. jun. 154; *Stackpole v. Beaumont*, 3 V. 89; *Winch v. James*, 4 V. 386; *Priestley v. Lamb*, 6 V. 420; *Millet v. Rowse*, 7 V. 419; *Pearce v. Crutch-*

field, 16 V. 48; *Ball v. Coutts*, 1 V. & B. 292; *Birkett v. Hibbert*, 3 My. & K. 227; *Baseley v. B.*, 4 Cl. & Fin. 378; *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Martin v. Foster*, 7 De G. M. & G. 98; *Gynn v. Gildard*, 1 Dr. & Sm. 356; *Re Tweedale's Settlement*, Johns. 109, 111; *Re Sampson and Wall*, 25 C. D. 482.

(*f*) *Brummell v. McPherson*, 7 V. 237; *Re Strong*, 5 W. R. 107; 26 L. J. Ch. 64.

(*g*) *Butler v. Freeman*, Amb. 301.

(*h*) *Salles v. Savignon*, 6 V. 572; *Bathurst v. Murray*, 8 V. 74; *Re Walker*, L. & G. t. Sugd. 299.

(*i*) *Warter v. Yorke*, 19 V. 453.

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meantime be restrained, and if it be found that the marriage of a ward is invalid, a valid marriage will be ordered (*a*).

In one case where a *male* ward had been led into a marriage derogatory to his rank, which turned out to be invalid, a different practice was adopted. Thus, in *Walter v. Yorke* (*b*), although it appeared that a woman who had gone through the ceremony of marriage with an infant ward of the Court, was pregnant, Lord *Eldon*, upon the Master's report, pronounced an order, that, on the part of the infant, a suit should be instituted in the Ecclesiastical Court, for nullity of the marriage, at the expense of the infant's estate, and the parties to the transaction were to be restrained from all intercourse, personal, by correspondence, or otherwise, with the infant (*c*).

It seems that, although the parties contriving or assisting at a marriage are not aware that the infant is a ward of the Court, their ignorance, although it may be urged in mitigation of the offence (*d*), will not be sufficient to acquit them of contempt of Court (*e*). In *Salles v. Sarignon* (*f*), although the bill, the object of which was to make the lady a ward of the Court, was only filed on the day of her marriage, Lord *Eldon* held, that the marriage in fact was sufficient to ground a contempt of Court.

Although the communication of the fact of a contempt having been committed by the marriage of a ward of the Court be not made to the Court until some years after the marriage, there is no doubt but that the Court has jurisdiction, and may feel it a duty to punish that contempt (*g*). "Yet it would not," Lord *Eldon* there observes, "be a very wholesome exercise of discretion to visit that offence strongly if, upon attention to circumstances that have occurred in the course of six, seven, or eight years, it is not very strongly called upon to vindicate the jurisdiction; and in these cases, where it is exercised really for the benefit of the party, the Court ought to look with great attention to all the circumstances of each case" (*h*).

And the Court has restrained proceedings taken in the Ecclesiastical Court against the ward or his guardian in alimony and resti-

(*a*) *Bathurst v. Murray*, 8 V. 74; *Re Walker*, L. & G. t. Sugd. 299; *Re Murray*, 3 D. & War. 83; *Re Wood*, Seton (1893), 900.

(*b*) 16 V. 451.

(*c*) And see *Bathurst v. Murray*, 8 V. 74.

(*d*) *More v. M.*, 2 Atk. 157; S.C., Barn. C. 404.

(*e*) *Mr. Herbert's Case*, 3 P. W. 116. See *King v. Harwood*, 2 Lev. 32, 1 Vent. 178; *Nicholson v. Squire*, 16 V. 259; *Martin v. Foster*, 7 De G. M. & G. 98.

(*f*) 6 V. 572.

(*g*) *Ball v. Coutts*, 1 V. & B.

302.

(*h*) *Ibid.*

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tution of conjugal rights by a person who married the ward in contempt of the Court (a).

The punishment for the contempt of Court by marrying or cohabiting in the marriage of a ward of the Court, is, as before observed, commitment to prison, by way of punishment; and in the principal case Lady Shaftsbury being a peeress, a sequestration was issued against her. It would seem, therefore, that privilege of Parliament will not shield a person from being committed for contempt of Court (b). Prosecutions for conspiracy or perjury for making a false declaration as to age or consent may also be directed (c).

Punishment, however, for the offence is not the only object of the commitment, as it is frequently made use of by the Court as the means of compelling the husband to make a proper settlement (d), and an inquiry may be directed as to whether the marriage was valid, what was the fortune of the infant ward, and what would be a proper settlement (e); and where there are *mitigating* circumstances, the husband, upon petition, undertaking to make a settlement approved of by the Court, may obtain his discharge (f). But in a flagrant case he will not be discharged, upon his offering to execute a proper settlement until the Court considers him sufficiently punished (g); nor, if the Court has ordered that he should be indicted for a conspiracy in procuring the marriage (h); at any rate, until he has either been acquitted, or upon being found guilty, has suffered punishment (i); and in general the husband in such cases will not be discharged until a certificate that the marriage is valid has been produced, and a proper settlement has been executed, and costs paid by him (k).

But, as Mr. Simpson observes (l), the power of the Court is now considerably hampered, for the adult husband, in marriages made on and after January the first, 1883, can no longer effect a valid settle-

(a) *Hill v. Turner*, 1 Atk. 515.

(b) See *Mr. Long Wellesley's Case*, 2 Russ. & My. 639; *Ex p. Mitchell*, 2 Atk. 172; *Re Armstrong*, (1892) 1 Q. B. p. 328.

(c) *Ball v. Coutts*, 1 V. & B. 292; *Wade v. Broughton*, 3 V. & B. 172; *Millet v. Rowse*, 7 V. 419; *Cox v. Bennett*, 22 W. R. 819.

(d) *Ball v. Coutts*, 1 V. & B. 300.

(e) See *Buckmaster v. B.*, 35 C. D. p. 22, affirmed 13 App. Cas. 61.

(f) *Stevens v. Savage*, 1 V. jun.

154; *Stackpole v. Beaumont*, 3 V. 89; *Seton* (1893), Form 16, p. 898.

(g) *Bathurst v. Murray*, 8 V. 79; *Baseley v. B.*, 4 Cl. & Fin. 378.

(h) *Priestley v. Lamb*, 6 V. 424.

(i) *Millet v. Rowse*, 7 V. 419.

(k) *Field v. Brown*, 17 B. 146; *Stevens v. Savage*, 1 V. jun. 154; *Millet v. Rowse*, 7 V. 419; *Cox v. Bennett*, 22 W. R. 819; *Seton* (1893), Form 18, p. 899.

(l) *Simpson, Infants* (1890), pp. 344, 345.

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ment of the infant wife's property (*a*), and by recent decisions it is clear that there is no jurisdiction to compel a ward to make a settlement (*b*), whilst it is doubtful to what extent there is jurisdiction to order a post-nuptial settlement (*c*).

If a ward enters into an engagement and the intended husband gives an undertaking to abide by the orders of the Court, and the marriage is intentionally postponed until the lady becomes of age, the Court cannot interfere either with the lady or her property (*d*).

Settlement on Marriage of a Ward of Court.—Where the marriage takes place *by the leave of the Court*, a settlement will be directed to be made.

It is difficult to lay down any rule upon the subject, as so much depends upon the circumstances of the parties, and, as *Turner*, L.J., said in *Martin v. Foster* (*e*), "the Court will give its sanction to any arrangement such as a prudent father would approve of." As a rule the husband would take the first life-interest in his own property, and the wife the first life-interest in hers to her separate use, without power of anticipation. Then provision would be made for the issue of the marriage, and, in default of issue, the husband's property is limited to himself absolutely, and the property of the wife, if she survive her husband, to her absolutely, but if she dies in his life-time, according as she shall appoint by will, and in default of appointment to her statutory next-of-kin. It is now general to give the wife a power of appointment whether she survive the husband or not (*f*). If she be illegitimate and so have no next-of-kin, the ultimate limitation will be to her absolutely (*g*). Provision should also be made for the children of a second marriage (*h*).

Formerly if a female ward, of age, made a settlement without the leave of the Court the Court nevertheless still considered her under its protection, and would inquire, if necessary, whether the settlement was a proper one (*i*). And where proposals for a settlement on the marriage of a ward had been entertained by the Court, the parties were not allowed to defeat the intention of the Court, by deferring the marriage until the ward came of age and then entering into fresh

(*a*) See The Married Women's P. Act, 1882; *Simpson* (1890), p. 33. *Smith v. Hiff*, 20 Eq. 666.

(*b*) *Leigh v. L.*, 40 C. D. p. 296;

Seaton v. S., 13 App. Cas. 61.

(*c*) *Leigh v. L.*, *Seaton v. S.*, *supra*.

(*d*) *Bolton v. B.*, (1891) 3 Ch. 270.

(*e*) 7 De G. M. & G. 102.

(*f*) *Ex p. Smith*, 22 W. R. 294;

(*g*) *Scott v. Hanbury*, (1891) 1 Ch. 299.

(*h*) *Rudge v. Winnell*, 11 B. 98; *Long v. L.*, 2 S. & S. 124.

(*i*) *Austin v. Halsey*, 2 S. & S. 123. (n.).

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settlements (*a*). So, too, if the proposed settlement were refused by the Court and the marriage took place after the ward's majority on terms not approved by the Court, the Court would interfere (*b*).

So an improper settlement, though the marriage took place after a female ward came of age, would be rectified, unless she consented to it (*c*).

An improper settlement has also been varied or rectified by the Court after the lapse of a considerable length of time, subject nevertheless, to the due protection of the rights and interests of persons who have come into *esse* since the time of the marriage (*d*); and of the husband (*e*); and of third parties, see *Bluckie v. Clarke* (*f*), where *Romilly*, M.R., refused to rectify the settlement to the prejudice of incumbrancers.

But it now seems to be clearly settled that the Court has no jurisdiction over the person or property of its wards after they have come of age (*g*); and further that the Court has no power to compel its infant wards to make any settlement of their property (*h*).

Where the marriage takes place *in contempt* of the Court, that is to say, without previously obtaining the consent of the Court, the nature of the settlement will depend in a great measure upon the fortune, position, and conduct of the husband. And before the husband can purge his contempt he must make a settlement satisfactory to the Court. But, as before stated, this power is now very greatly restricted (*i*).

When the contempt is gross, the settlement will be framed in such a manner as to exclude the husband from all interest, and the rule will only be departed from in cases where it could be clearly shown that the departure would be for the benefit of the lady (*k*); but the wife will be given power, in default of issue, to appoint in the husband's favour by will. If the wife be the offending party she cannot in the same manner be excluded from the husband's property.

(*a*) *Hobson v. Ferraby*, 2 Coll. Ch. R. 412.

(*b*) *Money v. M.*, 3 Drew. 256; *Re Donne*, 2 Moll. 490; *Biddles v. Jackson*, 26 B. 282; *Cook v. Fryer*, 1 Ha. 498; see *vide Sams v. Cronin*, 22 W. R. 204; and *cf. Bolton v. B.*, (1891) 3 Ch. 270.

(*c*) *Long v. L.*, 2 S. & S. 119.

(*d*) *Cave v. C.*, 15 B. 227; *Smith v. Riffe*, 20 Eq. 666.

(*e*) *Re Hoare*, 4 Gif. 254.

(*f*) 15 B. 595.

(*g*) *Longbottom v. Pearce*, 3 De G. & J. 545 (n.); *White v. Herrick*, 4

Ch. 345; *Sams v. Cronin*, 22 W. R. 204; overruling *Biddles v. Jackson*, 26 B. 282, 3 De G. & J. 544; *Bolton v. B.*, (1891) 3 Ch. 270.

(*h*) *Leigh v. L.*, *infra*; *Seaton v. S.*, 13 App. Cas. 61.

(*i*) *Supra*, pp. 505, 506.

(*k*) *Wade v. Hopkinson*, 19 B. 613, 619; *Hodgens v. H.*, 4 Cl. & Fin. 523; *Baseley v. B.*, *Ib.*, p. 375 (n.); *Field v. Brown*, 19 B. 170; *Field v. Moore*, 7 De G. M. & G. 691; *Barrett v. Herbert*, 3 M. & K. 227; and *vide Martin v. Foster*, 7 De G. M. & G. 98.

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as he is bound to support her (*a*); and the Court will not appoint trustees of the marriage settlement, persons who are on unpleasant terms with the wife (*b*).

When the contempt has not been of a very aggravated character, as for instance where the husband was ignorant at the time of the marriage that his wife was a ward of the Court, and there are "alleviating circumstances" attending the contempt, the settlement will be more favourable to the husband (*c*). A life interest in part of the income of the wife may be given to him during the coverture (*d*), and the wife should generally have power to appoint to him by will (*e*).

The mere fact, however, of marriage with a female ward of Court, without the Court's consent, will confer upon the Court a jurisdiction to *decline, during the joint lives of the husband and wife, to part with a fund in its own power and custody belonging to the ward*, even upon the application of the husband and wife and upon the consent of the wife in Court, until such settlement should have been made thereof as should appear advisable and proper under the circumstances of the case (*f*). It seems, however, to be doubtful whether the Court in such a case would have power to correct or enforce a settlement against the wishes both of the husband and wife (*g*).

It may be here mentioned that when a proper case is made out, the Legislature has annulled marriages where infants have, by fraud, misrepresentation, or violence been induced to go through the ceremony of marriage. See cases collected in the report of the proceedings in *Field's Marriage, annulling Bill* (*h*).

A settlement made by an infant ward under the Infants' Settlement Act (*i*), with the sanction of the Court, is only valid and binding so far as the infancy of the person making it is concerned. It deals with the incapacity of infants alone (*k*).

As a man on marriage became (in cases unaffected by the Married Women's Property Acts, entitled to a woman's personal estate not set-

(*a*) *Re Murray*, 3 Dr. & War. 83; *Re Sampson and Wall, Infants*, 25 C. D. 482; *Field v. Moore*, 19 B. 176, disapproved.

(*b*) *Re Sampson and Wall, Infants*, 25 C. D. 482.

(*c*) *Richardson v. Merrifield*, 4 De G. & Sm. 161; *Wilkinson v. Jonghin*, *infra*.

(*d*) *Bathurst v. Murray*, 8 V. 74.

(*e*) *Millet v. Rowse*, 7 V. 419; *Wilkinson v. Jonghin*, 41 L. J. Ch. 234

(*f*) *Martin v. Foster*, 7 De G. M. & G. 98; *Biddles v. Jackson*, 3 De G. & J. 344, 26 B. 282; *Gynn v. Gilbard*, 1 Dr. & Sm. 356; *Cator v. Mason*, 2 W. R. 667.

(*g*) *Martin v. Foster*, 7 De G. M. & G. 98, 101; *Re Sampson and Wall*, 25 C. D. 482.

(*h*) 2 H. L. Cas. 48.

(*i*) 18 & 19 Vict. c. 43.

(*k*) *Seaton v. S.*, 13 App. Cas. p. 69.

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tioned to her separate use, his covenant to settle it will be binding upon her as well as upon him. But in a case where a female ward, entitled to leaseholds for her separate use, made a settlement under the order of the Court, giving a power of sale to trustees, it was held, that a sale made by the trustees during her minority was not valid (*a*).

As to confirmation by a woman after the death of her husband of a voidable settlement made upon her marriage, while an infant, see *Davies v. D.* (*b*). If actually void, it cannot be confirmed (*c*).

Where a marriage has been solemnised between parties, one or both of whom is or are under age, by a false oath or fraud, the parent or guardian whose consent has not been obtained, may, by information in the Court of Chancery, obtain a forfeiture of the property the offending party takes by the marriage, and the Court has power, under 4 Geo. 4, c. 76, s. 25, to make a settlement thereof; any agreement or settlement by the parties inconsistent with that to be made by the Court being void (sect. 24); and the principle upon which the Court acts in carrying into effect the directions by the Act is to prevent the offending party from deriving any pecuniary benefit from the marriage, as far as may be, without prejudicing the pecuniary interests of the innocent party and the issue of the marriage (*d*). Where the fund in possession was small, the Court, instead of ordering a settlement, after declaring the forfeiture, directed the trustees to transfer the residue of the fund into Court, and declared the trusts (*e*).

The form of order in *Attorney-General v. Clemens* (*f*), declared the trusts of the funds both in possession and reversion.

The offending husband will not be allowed his costs out of the fund (*g*).

4. Testamentary Guardians.

By the Act of 12 Car. 2, c. 24, s. 8 (*h*), it is enacted "that where any person hath, or shall have, any child or children under the age

(*a*) *Simpson v. Jones*, 2 Russ. & M. 365.

(*b*) 9 Eq. 468.

(*c*) Per *Lindley, L.J.*, *Buckmaster v. B.*, 35 C. D., p. 37.

(*d*) See *A.-G. v. Lucas*, 2 Ph. 753; *A.-G. v. Read*, 12 Eq. 38; and see *A.-G. v. Mullay*, 4 Russ. 329, 7 B. 351; *A.-G. v. Severne*, 1 Coll. Ch. R. 313.

(*e*) *A.-G. v. Clements*, 12 Eq. 32; *Thorpe v. Owen*, 2 W. R. 208; *Wil-*

kinson v. Joughin, 41 L. J. Ch. 244.

(*f*) 12 Eq. 36.

(*g*) *A.-G. v. Akers*, W. N. 1872-1. 45; *A.-G. v. Clements*, 12 L. J. 36. See 2 Seton, (1893) p. 905, cf. *Lee v. Hutton*, 14 Jur. 638.

(*h*) A similar Act was passed in Ireland, 14 & 15 Car. 2 (Ir.), c. 19, except that no persons could be appointed guardians who did not belong to the Church of England.

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of one-and-twenty years, and not married at the time of his death, it shall be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time *en ventre sa mère*, or whether such father be within the age of one-and-twenty years or of full age, by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for, and during such time as he or they shall respectively remain under the age of one-and-twenty years, or any lesser time, to any person or persons in possession or remainder, other than Popish recusants; and such disposition of the custody of such child or children, made since the 24th of February, 1655, or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise: And such person or persons to whom the custody of such child or children hath been, or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass, against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children, and shall and may recover damages for the same in the said action, for the use and benefit of such child or children." Sect. 9: "Such person or persons to whom the custody of such child or children hath been, or shall be so disposed or devised, shall and may take into his or their custody to the use of such child or children the profits of all lands, tenements, and hereditaments of such child or children, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children, till their respective age of one-and-twenty years, or any lesser time, according to such disposition as aforesaid; and may bring such action or actions in relation thereto as by law a guardian in common socage might do" (a).

The testamentary guardianship is a prolongation of the paternal authority (b). The right given to him is the right of tuition and custody. It is given to him as a trust to be exercised, but the Court will interfere with his discretion in exercising that trust in a way in which it will never interfere with the discretion of a father (c). Illegitimate children are not within the Act (d).

(a) See *Bodell v. Constable*, Vaugh. 177; *Butler v. Freeman*, Amb. 302.

(b) See the principal case, and *Wellesley v. W.*, 2 Bli. (N. S.) p. 145; *Simpson*, Infants (1890), p. 222.

(c) Per *Cotton*, L.J., in *Re Agar-Ellis*, 24 C. D. p. 332.

(d) *Ward v. St. Paul*, 2 Bro. Ch. 583; *Peckham v. P.*, 2 Cox, 46; *Sleeman v. Walker*, 13 Eq. 36.

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Although a father has no right, under 12 Car. 2, c. 24, to nominate guardians for his *natural* children, the Court will generally appoint those whom he has selected (*a*); and will not allow the mother to remove them from their residence with their guardians, although she will be allowed reasonable access to them (*b*).

As to the exception of Popish recusants: Roman Catholic and other disabilities are now removed (*c*), and it seems that the religious tenets of the person appointing, and of the persons appointed, testamentary guardians, will not be any obstacle to the validity of the appointment. Thus an appointment by a Jew (*d*), or of a Roman Catholic, though an ecclesiastic in England (*e*), or in Ireland (*f*), or of a dissenter (*g*), will be valid. And although the Court would allow the appointment of members of a firm individually as guardians, it will not recognise the appointment of a firm, as "the house of Messrs. A. B. and C.," in that capacity (*h*).

The mother may be appointed testamentary guardian (*i*).

A father, moreover, may appoint a person to be guardian upon the happening of some future event (*k*), but if the event do not take place the person so appointed will not be guardian. Thus, a man appointed his wife guardian of his son, and added that if his wife married again before his son attained twenty-one, from thenceforth he appointed his brother sole guardian. The wife not having married again, died before the son attained twenty-one, and it was held that the brother could not be guardian (*l*).

If an unmarried woman be appointed, and afterwards marries, the husband is not guardian, nor is the guardianship forfeited by his misdemeanour (*m*); but if the infant be a ward of Court, the Court may inquire what ought to be done (*n*).

(*a*) *Peckham v. P.*, 2 Cox, 46; *Ward v. St. Paul*, 2 Bro. Ch. 583.

(*b*) *Ord v. Blackett*, 9 Mod. 116.

(*c*) See as to Popish recusants 3 Jac. 1, c. 5; 25 Car. 2, c. 2, s. 5, repealed by 7 & 8 Viet. c. 102; 26 & 27 Viet. c. 125; the R. C. Emancipation Act, 10 G. 4, c. 7. As to persons denying the Trinity or the Christian religion, see 9 & 10 Will. 4, c. 32, repealed as to the Trinity, 53 G. 3, c. 160; and see Simpson, *Infants* (1890), p. 218.

(*d*) *Villareal v. Mellish*, 3 Swans.

538.

(*e*) *Talbot v. Shrewsbury*, 4 My. & C. 673.

(*f*) *Re Byrnes*, 7 Ir. R. C. L. 199.

(*g*) *Corbett v. Tottenham*, 1 Ball & B. 59.

(*h*) *De Mazar v. Pybus*, 4 V. 647.

(*i*) See *Selby v. S.*, *infra*.

(*k*) *Selby v. S.*, 2 Eq. Ca. Abr. 488.

(*l*) *Selby v. S.*, *supra*.

(*m*) *Com. Dig. Guardian*, I. 2.

(*n*) *Jones v. Powell*, 9 B. 500; Simpson, *Infants* (1890), p. 223.

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By the Statute of Wills (*a*), the power of making a will is taken away from an infant, who can, therefore, now only appoint a guardian for his children by deed.

No particular form of words is essential for the appointment of guardians. Thus, where a testator desires "his son and daughter to be under the care and direction of A. B. and C. D." (*b*), or directs M. to "take the care and management of B. house, and my children" (*c*), they will be held to have been properly appointed guardians under the Act (*d*).

But, where a testator devises his land "to A. B. during the minority of his son and heir in trust for his heir, and for his maintenance and education until he be of age" (*e*), or appoints A. B. to "be guardian of the estate" of his infant children (*f*), A. B. will not thereby be constituted a testamentary guardian.

An appointment of a guardian by deed is said by *Eldon*, C., "to be only a testamentary instrument in the form of a deed or will" (*g*), and may be revoked by a will (*h*). But a testamentary appointment of guardian is not revoked by a subsequent informal appointment of others (*i*), or by a codicil, by which the care, charge, and education of the children is left to another (*k*), and where persons are trustees and guardians, although the trusteeship may be revoked, they will still remain guardians (*l*).

The office of testamentary guardian, where there are more than one, goes to the survivor (see the principal case), and it has been recently decided, that sect. 8 of 12 Car. 2, c. 24, sanctions a father in giving authority to a surviving guardian to nominate a person in the place of one who has died (*m*).

A guardianship, however, as is laid down in the principal case, is not assignable (*n*).

(*a*) 1 Vict. c. 26, s. 7.

(*b*) *Bridges v. Hales*, Mos. 108, and see *Teynham v. Lennard*, 4 Bro. P. C., Toml. ed. 302, where the appointment was by parol, but see the s. 8, *supra*, and *Re Matthews*, 12 Ir. C. L. 233. *Simpson, Infants* (1890), p. 217.

(*c*) *Miller v. Harris*, 14 Si. 540.

(*d*) See also *Mendes v. M.*, 3 Atk. 619; *Re Park*, 14 Si. 89; but see *Edwards v. Wise*, Barn. C. 139.

(*e*) *Bedell v. Constable*, Vaugh. 184.

(*f*) *Re Lord Norbury*, 9 Ir. R. Eq. 134.

(*g*) *Ex p. Ilchester*, 7 V. 367.

(*h*) *Shaftsbury v. Hannam*, Cas. t. Finch, 323.

(*i*) *Ex p. Ilchester*, *supra*.

(*k*) *Hare v. H.*, 5 B. 629, and see *Knott v. Coffee*, 2 Ph. 192.

(*l*) *Re Park*, 14 Si. 89.

(*m*) *Re Parnell*, 2 P. & D. 379.

(*n*) See also *Mellish v. De Costa*, 2 Atk. 14; *Reynolds v. Tenham*, 9 Mod. 40; *Villareal v. Mellish*, 2 Sw. 536.

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Testamentary guardians, before acting, may disclaim (*a*), but if they have once acted, they cannot renounce (*b*), although where there is no charge against them, they may be removed with their consent (*c*), and the Court may appoint other persons as *quasi* guardians to have charge of the infant until further order (*d*).

Where a will contains simply an appointment of a guardian but no disposition of personal property, or an appointment of an executor, it is not entitled to probate (*e*).

A testamentary guardian will not be disabled from exercising the office from having been a witness to the execution of the deed by which he was appointed (*f*).

A testamentary guardian of minor children is entitled to a grant of administration for their use and benefit, preferably to a guardian elected by the children, and a grant made to the latter will be revoked, and a fresh grant made to the testamentary guardian (*g*).

A testamentary guardian is a trustee by construction, not by name, of all property which comes into his hands as guardian (*h*), and therefore the Statute of Limitations is (*i*) inapplicable to accounts as between him and his wards (*k*). They may, however, lose all right to make any claim against him or his estate by acquiescence (*l*).

The guardianship may be appointed to last until twenty-one, or for any less time (*m*). If no period is mentioned for its duration, it will last during minority (*n*). It is not determined, as was decided in the principal case, by the marriage of a male infant. In *Mendes v. M.* (*o*), Lord *Hardwicke* is reported to have said that the marriage of a female ward would determine the guardianship, but this *dictum* does not appear in the case as reported in 3 *Atk.* 624, and in another case the same Judge held that the guardianship of a person

(*a*) *O'Keeffe v. Casey*, 1 *Sch. & L.* 106.

(*b*) *Spencer v. Chesterfield*, *Amb.* 146.

(*c*) *Re McCullochs*, *Dr.* 276.

(*d*) *Spencer v. Chesterfield*, *Amb.* 146.

(*e*) *Lady Chester's Case*, 1 *Vent.* 207; *Re Morton*, 12 *W. R.* 320; *Gilliat v. G.*, 3 *Phill.* 222.

(*f*) *Morgan v. Hatchell*, 19 *B.* 86.

(*g*) *Re Morris*, 2 *Sw. & Tr.* 360.

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(*h*) *Sleeman v. Walker*, 13 *Eq.* 36; and see *Re Agar-Ellis*, 24 *C. D.* p. 332.

(*i*) *Cf.* *Judicature Act*, 1873, s. 23, s.s. 2; and the *Trustee Act*, 1888, s. 8.

(*k*) *Mathew v. Brice*, 14 *B.* 341.

(*l*) *Sleeman v. Wilson*, 13 *Eq.* 36.

(*m*) *Vaugh.* 184, *Simpson, Infants* (1890), p. 220.

(*n*) *Mendes v. M.*, 1 *V.* 91; but see *Vaugh.* 184, 185.

(*o*) 1 *V.* 91.

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appointed by the Court of Chancery did not determine by marriage of a female ward (*a*).

No power was given to the mother under the Statute of Charles of appointing a testamentary guardian (*b*), and the appointment of one by her husband supersedes her guardianship by nature and nurture. But, although a mother had no legal power by will to appoint a guardian for her children, yet the Court had regard, in the appointment of a guardian, to the expression of her wishes, especially when there has been a similar indication to those of the father (*c*).

With respect to the real estate of his ward a testamentary guardian had no estate, but only certain undefined powers (*d*), but under the Settled Land Act, 1882, s. 60, such powers may be exercised by the trustees of the settlement, or, if there are none, then by the Court, on the application of the testamentary or other guardian.

5. Jurisdiction of Court.

Over Father.—"The law of England has recognised the natural rights of a father, not as guardian of his children, but as the father, because he is the father. * * The father has greater rights than the testamentary or any other guardian. These are sacred rights because the duties of a father are sacred duties" (*e*). "The Court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father, except it be in those special cases in which the State is called upon, for reasons of urgency, to set aside the parental authority, and to intervene for itself" (*f*). For as parents are entrusted with the custody of the persons and the education of their children, upon the presumption that the children will be properly taken care of, will be brought up with due education, and will be treated with kindness and affection, when this presumption is removed by the conduct of the parents, the Court will interfere, and will appoint a suitable person as guardian (*g*), or, if the father be living, to act as guardian (*h*).

(*a*) *Roach v. Garvan*, 1 V. 160; 24 C. D., pp. 328-329, approving *Re Jones v. Powell*, 9 B. 345. Plonley, 47 L. T. (N. S.) 284.

(*b*) See now Guardianship of Infants Act, 1886, s. 3, p. 532, and judgment of *Kekewich, J.*, in *Re G—*, (an infant) (1892) 1 Ch. 292. (*f*) Per *Bowen, L.J.*, in *Re Agar-Ellis*, 24 C. D., p. 335. Cf. *Smart v. S.*, (1892) A. C. 425.

(*c*) *Re Kaye*, 1 Ch. 387.

(*d*) *Simpson, Infants* (1890), p. 223; citing *Gardner v. Blanc*, 1 Ha. 381. (*g*) See *Story, Eq.* (1892), p. 920; and judgment of *James, L.J.*, in *Re Agar-Ellis*, 10 C. D. 71.

(*e*) Per *Brett, M.R.*, *Re Agar-Ellis*,

(*h*) See *Ex p. Mountfort*, 15 V. 446.

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The High Court will not exercise this delicate and difficult jurisdiction unless and until it is "satisfied not only that it has the means of acting safely and beneficially, but also that the father has so conducted himself, or has shown himself to be a person of such description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare in some very serious and important respect, that his rights should be treated as lost or suspended,—should be superseded or interfered with" (a).

But it is impossible to state "in other than elastic terms, the grounds on which the Court should think fit to interfere" (b). "The course of legislation shows distinctly a growing sense that the power formerly accorded by law to fathers of families was excessive, and that the welfare of the children, now recognised as the paramount consideration (c), required that it should be cut down" (d).

In former editions of this work, it is stated that the Court will interfere between a father and his children "when they are wards of Court" (e); but the words "wards of Court" would there seem to be used in the sense that all British subjects who are infants are wards of Court, because they are subject to that sort of parental jurisdiction which is entrusted to the Court in this country, and which may be exercised, as it has been in many cases (f) whether they have property or not, although where the infant has no property it makes it extremely difficult to exercise it (g).

In *Agar-Ellis v. Lascelles* (h), the C.A. decided that the Court will not interfere with the paternal authority, although the infants are wards of Court, unless there is gross moral turpitude (i), or abdication of paternal authority (k), or the father seeks to remove

(a) Per *Knight-Bruce*, V.-C., in *Re Fynn*, 2 De G. & Sm. 457; *Re Curtis*, 28 L. J. Ch. 458; cited *Re Goldsworthy*, 2 Q. B. D. 75; *Re Newton*, (1896) 1 Ch. 740, 748.

(b) *Smart v. S.*, (1892) A. C., p. 432.

(c) *Reg. v. Gyngall*, (1893) 2 Q. B. 232; *Re Newton*, (1896) 1 Ch. 740.

(d) See *Smart v. S.*, *supra*, p. 435.

(e) See edition 1886, p. 733.

(f) See *Re Fynn*, 2 De G. & Sm. 457; *Re Spence*, 2 Ph. 247; *Warde v. W.*, 2 Ph. 786; *Re Scanlan*, 40 C. D. 200.

(g) See judgment of *Kay*, J., in *Brown v. Collins*, 25 C. D., p. 60.

(h) 24 C. D. 317.

(i) *Ex p. Warner*, 4 Bro. Ch. 101; *Re Fynn*, 2 De G. & Sm. 457; *Warde v. W.*, 2 Ph. 786; *Wellesley v. Beaufort*, 2 Russ. 1; *Re Newton*, (1896) 1 Ch. p. 753.

(k) *Lyon v. Blenkin*, Jac. 245; *Powell v. Cleaver*, 2 Bro. Ch. 499; *Creuze v. Hunter*, 2 Cox, 242; *Re Lyons*, 22 L. T. 770; *Vidler v. Collyer*, 47 L. J. 285; *Re Newton*, (1896) 1 Ch. p. 752.

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the child, being a ward of Court, out of the jurisdiction of the Court without its consent (a).

Where the character of the father is good, although he may be poor and insolvent, his children will not be taken from him (b), for mere poverty is no ground for the interference of the Court (c); but where the father is insolvent, and his character is bad, and he has deserted his children, or is endangering their property, and neglecting their education, *à fortiori* if he is out of the jurisdiction, the Court will interfere (d).

In *Crouze v. Hunter* (e), a petition was presented stating the entangled state of Mr. Hunter's property, and that he was an outlaw, and resided abroad, and that his son, an infant, was entitled in remainder to a very considerable estate, as also to maintenance by the will of his grandfather; and prayed that Mr. Hunter might be restrained from taking his son abroad, or improperly interfering with his education, which was then principally directed by his mother, who lived separate from her husband. Affidavits were filed on both sides, imputing very improper conduct to both father and mother. *Thurlow*, C., ordered that the father should be restrained from interfering with the management of his child without the consent of Lord Hawke and Mr. Adams, whom both parties allowed to be proper persons for such a purpose and observed, that he was of opinion that the Court had arms long enough to reach such a case, and prevent a parent from prejudicing the health or future prospects of the child; and that whenever a case was brought before him, he would act upon this opinion, and that he certainly would not allow the child to be sacrificed to the views of the father (f).

Where both the father and mother have been guilty of misconduct of the worst kind, the guardianship of the infants will be committed to other persons, but a liberal allowance will be made to them in order to support their parents (g).

But where a man was not able to maintain his children, and his

(a) *Rochford v. Hackman*, Kay, 308; *Re Plomley*, 47 L. T. 283; *Re Fynn*, *supra*; *Crouze v. Hunter*, *infra*.

(b) *Kilpatrick v. K.*, Macphers. 143.

(c) *Re Curtis*, 28 L. J. Ch. 463.

(d) See *Kiffin v. K.*, cited 1 P. W. 705; *Ex p. Mountfort*, 15 V. 445; *Wilcox v. Drake*, 2 Dick. 631; *Re England*, 1 Russ. & M. 499; *Thomas*

v. Roberts, 3 De G. & Sm. 758; and see *Re Cornicks*, 2 Ir. Eq. R. 264.

(e) 2 Cox, 242.

(f) See S. C., 2 Bro. Ch. 500, n., Belt's edit.; Jac. 250, n.; *Ex p. Warner*, 4 Bro. Ch. 101; *Skinner v. Warner*, 2 Dick. 779.

(g) *Allen v. Coster*, 1 B. 202.

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character was such that the Court would not have appointed him a guardian, the Court would not interfere by the appointment of a guardian where the grandmother, not having any property to settle, only offered to undertake and covenant to maintain them, although it would have been most beneficial to the infants to have been taken out of the custody of their father (*a*).

Where the father has committed a breach of marital duty (*b*); or where the father, holding speculative religious opinions which might be detrimental to the happiness of his children and imperil their welfare, has deserted his wife, the Court has not hesitated, in exercise of its jurisdiction, to remove the children from their father (*c*). In *Wellesley v. Beaufort* (*d*), the habits of the father, whose children were taken from him, were profligate, and his language often profane and he cohabited in his own house in open adultery with the wife of another man. And where the Court was satisfied that the father of children of from ten to two years old had committed an unnatural crime, the Court not only refused to give possession of the children to the father, but even after he had escaped conviction by the witnesses not appearing against him, would not allow the children to have any intercourse with him; and even if they had been with him, it would have felt it to be proper to remove them (*e*), and if a father be living in a state of habitual drunkenness (*f*), incapacitating himself from taking care of his children's education, especially if he poisons the minds of his children with blasphemy, the Court would take care that the children should not be under the control of a person so debased and so likely to injure them (*g*).

Where a father, who had for four years abandoned his wife and his child—a ward of Court—and laboured under religious delusion such as rendered him totally unfit to superintend the education of his child, he was restrained from interfering with his custody,

(*a*) *Re Fynn*, 2 De G. & Sm. 457. And see *Westmeath's Case*, Jac. 251, n.

(*b*) *Re Halliday*, 17 Jur. 56; *Re Elderton*, 25 C. D. 220.

(*c*) See *Shelley v. Westbrook*, Jac. 266, n.; *Curtis v. C.*, 5 Jur. (N. S.) 1147; *Re Meades*, 5 Ir. R. Eq. 98; *Re Grimes*, Ib. 465; and cf. *Re Besant*, 11 C. D. 508, which was decided on the Infants Custody Act, 1873, p. 531.

infra, and see especially the judgment in *Smart v. S.*, (1892) A. C. p. 432.

(*d*) 2 Russ. 1, affirmed H. of L. 2 Bligh (N. S.) 124.

(*e*) *Anon.*, 2 Sim. F. S. 54.

(*f*) Cf. *Re Newton*, (1896) 1 Ch., p. 753.

(*g*) See *Wellesley v. Beaufort*, 2 Russ. 30; *De Manneville v. De M.*, 10 V. 62; *Warde v. W.*, 2 Ph. 786.

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and there was a reference to approve of a proper person to act as guardian (*a*). And where a father who had been bankrupt, had by his cruel behaviour to his wife compelled her to exhibit articles of peace against him under which he was committed to Newgate for want of bail, previous to which event he had no settled place of abode, and was unable to provide for his infant children or wife, there was a reference to approve of a proper person to have the care of their persons and superintendence of their education during their minorities, and the father was restrained from removing them from the several schools and situations where they had been placed by their mother and her relations (*b*). Gross ill-treatment and cruelty by a father to his children will justify the Court in superseding his authority (*c*).

However, acts on the part of a father which, although somewhat cruel, amount to little more than harshness or severity (*d*), although they may be such as may prevent his wife from living happily with him, provided they be not such as to contaminate the morals of his children (*e*), will not afford sufficient grounds for the Court to interfere with the father's power over his children; nor will the fact that he had *formerly* been given up to idleness, profligacy, and drunkenness (*f*).

The Court has refused to deprive a father, though living in adultery, of the custody of his child, where he did not bring the child in contact with the woman with whom he was so living; or to order him to permit the mother to have access to the child, where no misconduct on his part was shown with reference to the management and education of the child. Thus, in *Boll v. B.* (*g*), where a lady and her daughter, who was about fourteen years of age, presented a petition, stating that the father was living in habitual adultery with another woman, on account of which a divorce had been obtained, and praying that the daughter might be placed under the mother's care, she offering to maintain her at her own expense, or that the

(*a*) *Thomas v. Roberts*, 3 De G. & Sm. 758.

(*b*) *Ex p. Warner*, 4 Bro. Ch. 101.

(*c*) See *Whitfield v. Hales*, 12 V. 492; *Re Newton*, *supra*; and cf. the Prevention of Cruelty to Children Act, 1894.

(*d*) See *Curtis v. C.*, 5 Jur. (N. S.)

1147, and cases there cited as to the rights of family life, approved by *Bowen, L.J.*, *Re Agar-Ellis*, 24 C. D., p. 337.

(*e*) *Re Spence*, 2 Ph. 252.

(*f*) *Re Halliday*, 17 Jur. 56. But cf. *Smart v. S.*, (1892), pp. 435, 436.

(*g*) 2 Si. 35.

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mother might be permitted to have access to her at all convenient times, *Hart, V.-C.*, dismissed the petition. "This Court," said his Honor, "has nothing to do with the fact of the father's adultery, unless the father brings the child into contact with the woman. All the cases on this subject go upon that distinction, when adultery is the ground of a petition for depriving the father of the common law right over the custody of his children. * * * Some conduct of the father, with reference to the management and education of the child, must be shown to warrant an interference with his legal right" (a).

In *Re Newton (b)*, John Newton was the father of two girls, the only survivors of six children of his marriage, aged respectively fifteen and eleven years. He was a fish-dealer in a small way of business, and was a Roman Catholic. The mother, who was a Protestant, died in 1888. On the marriage it had been agreed that the children should be brought up as Roman Catholics. The father had not insisted on this agreement being carried out, and during the mother's life the children were brought up in her faith, and this state of things continued for a long time after her death. From 1888 to 1894 the father was of intemperate habits, and had been convicted several times of being drunk and disorderly. In October, 1890, an aunt had left the two children an annuity of 50*l.* each. The father had dissipated money paid to him for their maintenance, and had neglected them so much that their half-brother removed them from the father's house. In December, 1894, an order was made, the father not appearing, that the infants should be given into the custody of a medical man, and the father was restrained from interfering with them. The father did not appeal from the order of December, 1894, but in 1895 took out a summons asking that the two girls might be transferred from the Protestant school where they were being educated to a Roman Catholic school, and the summons was supported by evidence to the effect that he had become a reformed character. The C.A., confirming the judgment of *Kekewich, J.*, who had an interview with the eldest girl, held that it would be injurious to the welfare of the children that their religious training should be altered, and on the whole circumstances of the case refused the application.

(a) See as to access in case where infant was a ward of Court, *Anon.*, *Jac.* 264, n., and judgment of *Bowen, L.J.*, in *Re Agar-Ellis*, 24 C. D., p.

335, *infra*, p. 528; and the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12), *infra*.

(b) (1896) 1 Ch. 740.

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Where children are taken from the custody of the parent, access or communication with him will, if proper, be permitted (*a*); for into whatsoever hands the custody of the children might fall, it would be their duty to consult the interest and happiness of the children, by allowing filial affection and duty towards their father to operate to the utmost (*b*).

Over Testamentary Guardian.—The Court will much more readily interfere in the case of a testamentary guardian than with the authority or discretion of a father. In the latter case it does not interfere, because of the great trust and faith it has in the natural affection of the father to perform his duties, and therefore gives him corresponding rights (*c*). Such guardian stands in an entirely different position. The right is given to him as a trust to be exercised, and the Court will interfere with his discretion in exercising that trust in a way in which it never will interfere with the discretion of a father (*d*).

Such a guardian can now be removed (*e*), although before the Act this was doubtful (*f*); and, upon a proper case being made out, he will be suspended (*g*), and a proper person will be appointed to *act as guardian*, and to superintend the maintenance and education of the infant (*h*). But, as was decided in the principal case, the pecuniary interest which a testamentary guardian may have in the death of the ward, will be no ground for superseding him (*i*). On the bankruptcy or insolvency of a testamentary guardian, a proper person will be appointed to have the care of the person (*k*); or to have the care of the maintenance and education (*l*) of the infant; and orders are frequently made, regulating the conduct of testamentary guardians and guardians appointed by the Court (*m*).

The marriage of a female testamentary guardian does not deter-

(*a*) *Wellesley v. Beaufort*, 2 Russ. 43.

(*b*) *Per Eldon, C.*, *Ibid.*

(*c*) *Re Agar-Ellis*, 24 C. D. 328.

(*d*) *Ib.* p. 332; *Beaufort v. Berty*, 1 P. W. 704; *Talbot v. Shrewsbury*, 4 My. & Cr. 673.

(*e*) See *Guardianship of Infants Act*, 1886, s. 6, *infra*, p. 333.

(*f*) *Ingham v. Bickerdike*, 6 Madd. 275.

(*g*) *Beattie v. Johnson*, 1 Ph. 31.

(*h*) *Foster v. Denny*, 2 Ch. Ca. 237;

Andrews v. Salt, 8 Ch. 622; *Ingham v. Bickerdike*, 6 Madd. 275.

(*i*) *Morgan v. Dillon*, 9 Mod. 135; *Dillon v. Lady Mount Cashel*, 4 Bro. P. C. 306, *Toml. edit.*; *Corbett v. Tottenham*, 1 Ball & B. 59.

(*k*) *Smith v. Bate*, 2 Dick. 631.

(*l*) *Heysham v. H.*, 1 Cox, 179.

(*m*) *Roach v. Garvan*, 1 V. 160; *Spencer v. Chesterfield*, Amb. 146; *O'Keeffe v. Casey*, 1 Sch. & L. 106; *Ex p. Ilchester*, 7 V. 381.

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mine the guardianship (a). But in *Jones v. Powell* (b), it was said by *Langdale, M.R.*, that, although the Court does not ordinarily interfere with a testamentary guardian, it has an undoubted control over any allowance directed to be paid to him; and if such a guardian being a *feme sole*, marries, it may, in a proper case, direct inquests.

But it proceeds on very different rules and principles from those which regulate its conduct where the guardians are appointed by itself (c), and the Court will not interfere unless it be for the infant's benefit (d).

Reciprocity between English and Scotch Courts.—Scotch testamentary tutors are not testamentary guardians, according to the statute (e). In cases relating to the care of infants, the benefit of the infant being the foundation of the jurisdiction and the test of its proper exercise, there ought on this subject to be a perfect reciprocity of action between the Courts of England and Scotland, although as to judicial jurisdiction the two countries may be to each other independent foreign countries (f).

Over Guardians appointed by the Court.—"Although the Court has power of interfering in certain cases with testamentary guardians, it proceeds on very different rules and principles from those which regulate its conduct when the discretion of appointing guardians devolves upon it in the first instance" (g). Thus, although it was doubtful prior to the Guardianship of Infants Act, 1886, whether the Court had power to remove a testamentary guardian, it never hesitated to remove a guardian appointed by itself, if it was for the benefit of the infant to do so. Such a guardian cannot resign his office (h), but the infant may apply to have somebody else appointed if the guardian becomes unwilling to act (i). Applications as to guardianship and maintenance are made by summons (k), but an action is necessary to remove a legal guardian on the ground of misconduct, unless he consent (l).

(a) *Roach v. Garyan*, 1 V. 160; *Dillon v. Lady Mount Cashel*, 4 Bro. P. C. 306, Toml. edit.

(b) 9 B. 345.

(c) *Beattie v. Johnson*, 1 Ph. 31.

(d) *Re Goode*, 1 Ir. Ch. 256.

(e) *Johnstone v. Beattie*, 10 Cl. & Fin. 42; *Scott v. Bentley*, 1 Kay & J. 281, 284; *Stuart v. Bute*, 9 H. L. Cas. 440.

(f) *Stuart v. Bute*, *supra*.

(g) Per Lord *Cottenham*, *Beattie v. Johnstone*, 1 Ph. 31; and *Jones v. Powell*, 9 B. 345.

(h) *Spencer v. Chesterfield*, Amb. 146.

(i) *Spencer v. Chesterfield*, *supra*; *Anon.*, 2 V. sen. 374; *Ex p. Champneys*, Dick. 350.

(k) R. S. C. 1883, O. 55, r. 2 (12), r. 25; *Seton* (1893), 844.

(l) *Re McCullochs*, 6 Ir. Eq. 293.

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In general, like the testamentary guardian, the guardian appointed by the Court will be entitled to the custody of the infant's person, but the Court, as in the principal case, will exercise its discretion either in ordering the ward to be delivered up to the guardian, or in permitting him to reside with the mother, or that she may have access to him (*a*). In *Courtois v. Vincent* (*b*), access to her children was allowed to the mother of illegitimate children, although a guardian was appointed by the Court.

Access will also be allowed to the friends of a deceased parent (*c*).

The guardian will be allowed to regulate the mode and settle the place for the education of his ward, whose obedience will be enforced by the Court (*d*).

Where the guardians differ as to the mode of education, the Court will decide between them (*e*); and in the appointment of guardians by the Court, much weight will be given to the wishes of the deceased father (*f*); of which parol proof was received in *Anon.* (*g*), but rejected in *Storke v. S.* (*h*).

Although the father may have appointed a testamentary guardian, if he has by his will desired that some one else should have the custody of his children, his wishes as to the custody will be complied with (*i*).

Where a female infant has arrived at years of discretion, the Court will consult her wishes as to which of her guardians she desires to reside with (*k*), and it has even allowed her at her option to remain in the custody of a person who was not a guardian, in preference to the legal guardian (*l*). But in such a case the Court would order the person so chosen to have the custody to enter into recognizances not to allow her to marry save by leave of the Court (*m*).

In general, the Court will not allow its wards to be taken out of

(*a*) *Ex p.* the Earl of Ilchester, 7 V. 380; *Wright v. Naylor*, 5 Madd. 77; *Talbot v. the Earl of Shrewsbury*, 4 My. & C. 672, 683.

(*b*) *Jac.* 268.

(*c*) *Hunter v. Macrae, Macphers.* 112.

(*d*) *Hall v. H.*, 3 Atk. 721; *Mitchol v. Duke of Manchester*, Dick. 129; *Tremain's Case*, 1 Stra. 173.

(*e*) *Duke of Beaumont v. Berty*, 1 P. W. 702; and see *Stuart v. Marquis of Bute*, 9 H. L. Cas. 440.

(*f*) *Campbell v. Mackay*, 2 My. & C. 34.

(*g*) 2 V. 56.

(*h*) 3 P. W. 51.

(*i*) See *Knott v. Cottee*, 2 Ph. 192; *Duke of Beaufort v. Berty*, 1 P. W. 706; see also *Hartley v. Smith*, 10 W. R. (L. J.) 763; reversing S. C., *Ib.* 750.

(*k*) *Storke v. S.*, 3 P. W. 50.

(*l*) *Bridget Hide's Case*, 3 Salk. 178; and see *Anon.*, 2 V. 374.

(*m*) *Bridget Hide's Case*, 3 Salk. 178; and see *Re Lyons*, 22 L. T. (N. S.) 770.

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its jurisdiction. And in *Mountstuart v. M.* (a), Lord Eldon is reported to have said, that the Court never makes an order for taking an infant out of the jurisdiction, and see *Stuart v. The Marquis of Bute* (b). And the father (c) and other guardians (d) have been restrained from removing their wards to a foreign country.

Exceptions, however, are sometimes made to the rule and are more easily obtained than formerly (e), although Lord Cottonchurn has observed, that such exceptions are and ought to be very rare, and that, since he had held the Great Seal, he had had reason to lament that the rule had not been more strictly adhered to (f).

In such cases the Court will generally take security for the return of the ward, if a stay of some duration will be for its benefit or for its proper education (g).

In an anonymous case (h), on the petition of the father of infant wards of the Court, who being appointed to a situation in the king's service, was about to reside abroad for several years, Lord Eldon, after much hesitation, ordered that he should be at liberty to take them abroad with him, undertaking to bring them, or such of them as should be living, back with him; and he was half-yearly to transmit, properly vouched, to be laid before the Court, the plan of tuition and education for each of the infants, actually adopted and in practice at the time of such half-yearly returns, specifying particularly where and with whom they resided (i).

When the health of the ward imperatively required another climate the Court would allow a removal there (k); but when the ward's state of health did not require a permanent residence abroad, he was formerly allowed to remain there only so long as it would be beneficial to him; see *Campbell v. Mackay* (l).

It has, however, been recently held, that in order to make out a case for taking a ward out of the jurisdiction, it is not essential to make out a case of necessity, but only to show to the Court that the step

(a) 6 V. 363.

(b) 9 H. L. Cas. 440.

(c) *De Manneville v. De M.*, 10 V. 32.

(d) *Shaftsbury v. Hannam*, Finch, 328; *Newport v. Moore*, Dick. 166.

(e) *Simpson*, Infants (1890), p. 158; *Dawson v. Jay*, 3 De G. M. & G. 764.

(f) 2 My. & C. 32.

(g) *Jeffrys v. Vanteswarstwarth*, Barnard, Ch. Rep. 141, 144; *Re Medley*, 6 Ir. R. Eq. 339.

(h) Jac. 265, n.

(i) And see *Logan v. Fairlie*, Jac. 193; *Stephens v. James*, 1 My. & K. 627; *De Weever v. Rochport*, 6 B. 391; *Re Loringe*, 6 B. 392, n.; *Re Daly*, 6 B. 393, n.; *Hart v. Tribe*, 19 B. 149; *Lethem v. Hall*, 7 Si. 141.

(k) See *Wyndham v. Ennismore*, 1 Keen, 467.

(l) 2 My. & C. 31.

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will be for the benefit of the ward, and that there is sufficient security that future orders will be obeyed (a). Probably a scheme of maintenance and education would be required (b).

The clandestine removal of a ward of Court from the custody of the person with whom such ward is residing, under the authority of the Court, is, in its nature, a criminal attempt (bb). Thus in *Wellesley v. Duke of Bedford* (c), a member of the House of Commons who had carried off his infant daughter, a ward of the Court, from the house of the ladies under whose care she had been placed by the guardians appointed by the Court, and who, on being personally examined by the Court, admitted the fact, and refused to state the present residence of his daughter, was ordered to be committed to the Fleet, although he was not a party to the suit.

It is a contempt of the Court to remove an infant out of the jurisdiction, even when he has enlisted in the army, without the leave of the Court (d); but where it appeared to be beneficial to the infant, he has been allowed to remain in the army (e).

As it is obviously impossible for the Court of Chancery, with the number of wards which it has under its care, to be aware of their conduct, it requires the guardians, from time to time, to give general information of what is taking place. If, for instance, a ward of the Court goes out of the jurisdiction, or from extravagant habits gets into difficulties, it becomes the duty of the guardians at once to apply to the Court in Chambers, where such assistance will be afforded as will extricate the ward from his difficulties (f).

A solicitor is bound to give to the Court any information which may lead to the discovery of the residence of a ward of the Court, whose residence is being concealed from the Court, although such information may have been communicated to him by his client in the course of his professional employment. Therefore, where the mother of wards of the Court had absconded with the wards, her solicitor was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the postmarks (g).

(a) See *Re Callaghan*, 28 C. D. 186; O'S., 15 P. D. p. 62.

Re Montagu, 28 C. D. 82.

(b) See *Jackson v. Hankey*, cited as Anon., Jac. 265; *Simpson* (1890), 158; *Campbell v. Mackay*, 2 My. & Cr.; *Re Clarke*, 21 C. D. p. 830.

(bb) As to privilege, cf. *Re Gent*, 40 C. D. 190; as to appeal, *O'Shea v.*

(c) 2 Russ. & My. 639.

(d) *Rochford v. Hackman*, Kay, 308; *Harrison v. Goodall*, 1b. 310, note (a).

(e) *Ib.*

(f) *Kay v. Johnson*, 21 B. 538.

(g) *Lansbotham v. Senior*, 8 Eq. 575; *Burton v. Earl of Darnley*, 1b. 576, n.

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The Court may order the guardian to attend at Chambers with the infant, or the infant to attend alone (*a*), or may order the sergeant-at-arms to bring the infant before the Court (*b*).

6. Custody.

Habeas Corpus.—Any person entitled to the legal (*c*) custody of a child may, subject as hereinafter appears, enforce such right by a writ of *habeas corpus* (*d*).

It is the universal law of England, that if any person alleges that another is under illegal control by anybody, that person may move before any judge for a writ of *habeas corpus*, and thereupon the person, under whose supposed control or in whose custody the person is alleged to be illegally and without his consent, is brought before the Court (*e*). The Court will exercise this delicate jurisdiction according to its judicial discretion, considering what course is most for the welfare of the children and the family, and having regard to the opinions of the day, rather than to those of past times (*f*).

In proceedings under *habeas corpus*, all Divisions of the Supreme Court now administer the law alike (*g*); and by the Judicature Act, 1873, sect. 25, sub-s. 10, all the Divisions of the High Court are enabled, even on *habeas corpus*, to regard something more than the strict rights of fathers and guardians, and the dominant consideration

(*a*) *Re Stedman*, 2 Seton, Dec. 753; *Smith v. Goode*, *Ib.*

(*b*) *Wellesley v. W.*, *Ib.* 754. Cf. *G. v. L.*, (1891) 3 Ch. 126.

(*c*) *Re Harper*, (1895) 2 I. R. 571; as to what is legal custody, see *Re Agar-Ellis*, 34 C. D. p. 331.

(*d*) See as to the older cases at law: *Reg. v. Greenhill*, 4 A. & E. 624; *Re Hakewill*, 12 C. B. 223; *Reg. v. Clarke*, 7 El. & Bl. 186; *Reg. v. Howes*, 3 El. & E. 332; *Re Turner*, 41 L. J. Q. B. 142; and as to more recent cases, *Re Agar-Ellis*, 24 C. D. 317; *Reg. v. Barnardo*, (1891) 1 Q. B. 194; (1891) A. C. 388; *Barnardo v. Ford*, (1892) A. C. 328; *Re Ethel Brown*, 13 Q. B. D. 614; *Reg. v. Gynghall*, (1893) 2 Q. B. 232; *Thomasset v. T.*, (1894) P. 300. A Court of law would formerly deliver the child to the father although

he were of a very bad character, *Ex p. Skinner*, 9 Moore, 278, or although circumstances existed under which the Court of Chancery would have held that he had forfeited his right to the custody: *Reg. v. Isley*, 5 A. & E. 441.

(*e*) See judgment of *Brett*, M.R., *Re Agar-Ellis*, 24 C. D., p. 326; explained *Reg. v. Gynghall*, (1893) 2 Q. B. 232.

(*f*) See *Smart v. S.*, (1892) pp. 435, 436; cf. also *Reg. v. Gynghall*, *infra*; *Re Agar-Ellis*, *supra*, and judgment of *Bowen*, L.J., p. 336; and *Ex p. Hopkins*, 3 P. W. 151; *Rex v. Greenhill*, 4 A. & E., p. 643; *Re Andrews*, L. R. 8 Q. B. 153; *Re Shanahan*, 20 L. T. 183; *Re Connor*, 16 Ir. C. L. 112; *Thomasset v. T.*, (1894) P., p. 298.

(*g*) See *Re Agar-Ellis*, 24 C. D., pp. 324 and 326; *Reg. v. Gynghall*, (1893) 2 Q. B. pp. 237, 248.

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of the Court will be that upon which the Courts of Chancery have always acted—namely, the welfare of the infant (*a*). And following the practice of the Court of Chancery, the Courts, in determining what is for the welfare of an infant (*b*), will, if it be of *any reasonable age*, see the infant and ascertain its own views on the matter (*c*). And probably a child who had attained years of discretion (see p. 496, *supra*) would not be ordered into the custody of either parent against its will (*d*).

Hence, on an application by a father to any Division of the High Court to obtain the possession of his child by a writ of *habeas corpus*, no order will be made in his favour if there are reasons against his having the custody, which would heretofore have operated upon the Courts of equity in such a case: see *Re Goldsworthy* (*e*). There the affidavits of the mother and others, in answer to a rule for a *habeas corpus* by a father to remove his child (a boy of nine years of age) from the custody of the child's maternal grandfather, disclosing facts which showed the applicant to be a person of intemperate and vicious life, and in the habit of using gross and disgusting language as well as personal violence to his wife, the Court of Queen's Bench Division declined to interfere, the present custody of the child being unobjectionable.

So in *Re Ethel Brown* (*f*), the father of a female child, aged nine, applied for a *habeas corpus* to obtain its custody. The Court being of opinion that the child was properly cared for by its mother, in whose custody it was, and that the father was an unreliable person not fit to have the care of so young a child, and was without a fixed home, and that the marriage was not satisfactorily proved, declined in its discretion to interfere, and the decision was upheld on appeal. In *Smart v. S.* (*g*), the husband applied for the writ against his wife, who had the custody of the three children of the marriage, two of them (girls) being over twelve years of age, the third (a boy) being under that age. The father's legal rights were controlled as to the youngest child by a statute framed on the principle of Talfourd's Act (*h*). The father was an habitual drunkard, and had made false

(*a*) See judgment of Lindley, L.J., in *Re Thomasset v. T.*, (1894) P., p. 300; *Smart v. S.*, (1892) A. C. 425; *Re McGrath*, (1893) 1 Ch. 143; *Reg. v. Gyngall*, (1893) 2 Q. B., pp. 243-248; see now the Custody of Children Act, 1891, 54 & 55 Vict. c. 3, *infra*, 533.

(*b*) See *Smart v. S.*, (1892) A. C. pp. 435, 436; *Reg. v. Gyngall*, *supra*, p. 253; *Re McGrath*, *supra*, p. 148.

(*c*) See *Reg. v. Gyngall*, (1893) 2 Q. B. p. 251, and the Act of 1891, *infra*, p. 534, s. 4.

(*d*) Per Lindley, L.J., *Thomasset v. T.*, (1894) P., pp. 302, 303. Cf. *Re Judkins*, 40 Sol. Jo. 729.

(*e*) 2 Q. B. D. 75.

(*f*) 13 Q. B. D. 615.

(*g*) (1892) A. C. 425.

(*h*) 2 & 3 Vict. c. 54.

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and injurious charges of a gross character against his wife. She had ample means, the husband a narrow income only. On appeal to the Judicial Committee of the Privy Council from the C.A. of Ontario, it was held, affirming the C.A. of Ontario, that under the circumstances disclosed it would be seriously prejudicial to the children to take them away from their mother in order to place them in the father's custody.

In *Reg. v. Gynghall* (a), the Court, on the ground that it was for the *welfare of the infant*, declined to order the custody of a female infant, aged fifteen, to be given to its mother, the legal guardian although there had not been any misconduct on her part. The Court had an interview with the child. Where the application is to take the child from the custody of either parent, a very strong case for the Court's interference would have to be made out (b).

In the case of an illegitimate child, the Court will consider the wishes of the mother, unless prejudicial to the welfare of the child (c). An appeal lies to the C.A. from an order of the Queen's Bench Division, directing the issue of a writ of *habeas corpus* to bring before the Court an infant in order to determine the custody and control of such infant (d).

Chancery Division, &c.—Independently of the writ of *habeas corpus*, the Court of Chancery has always exercised the power of the Crown as *parens patrie* over infants, and its exercise of such jurisdiction has always been much more extensive than that possessed by courts of law under the writ. "It is essentially a parental jurisdiction, and * * the main consideration to be acted upon in its exercise is the benefit or welfare of the child" (e), and the infants need not be wards of Court or have property (f).

In *Ex p. Hopkins* (g), the petitioner, the father, had three daughters, the eldest of whom was thirteen. The three children lived in the house of their paternal uncle, who died leaving them large legacies. After their uncle's death the children continued to reside at the house with one of the executors. *King, C.* had an interview with the eldest child, and ascertained that she thought it her duty,

(a) (1893) 2 Q. B. 232.

Re Newton, (1896) 1 Ch. 740.

(b) *Reg. v. Gynghall*, *supra*, at p. 253; *Re Agar-Ellis*, 24 O. D. 317.

(c) Per *Kay, L.J.*, *Reg. v. Gynghall*, (1893) 2 Q. B., p. 248; *Re Newton*, *supra*; *Smart v. S.*, (1892) A. C. pp. 435, 436.

(d) *Barnardo v. McHugh*, (1891) A. C. 388; *Ex p. Emerson*, 11 Times Rep. 218.

(f) *Re McGrath*, (1892) 2 Ch. p. 511.

(g) *Barnardo v. McHugh*, *supra*; *Barnardo v. Ford*, (1892) A. C. 326.

(g) 3 P. W. 151.

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under the circumstances, so to reside, as she thought her uncle had so intended. The petition was dismissed, with a direction that the parents should have access at all reasonable times.

In *Re Agar-Ellis* (a), the husband on his marriage promised his wife that the children should be brought up as Roman Catholics, but after the birth of the first child changed his mind and determined they should be brought up as Protestants. The mother insisted upon bringing them up as Roman Catholics. The father thereupon instituted in 1878 this action, making the infants wards of Court, and took out a summons therein for directions as to where and by whom the children should be educated. The mother in the same year (1878) presented a petition at the Rolls asking that they should be brought up as Roman Catholics and that she should not be deprived of their society. The summons and petition were heard together in 1878. The three girls, the issue of the marriage then living, being then of the respective ages of twelve, eleven, and nine, the C.A. declined to examine children of such tender years (b), and, affirming the decision of *Malins*, V.-C., held that the father had the sole right to decide in what religion the children should be brought up, and restrained the mother from taking them to Roman Catholic places of worship. In consequence of this decision the father removed the children from the care of the mother and placed them with other persons, allowing the mother to visit them once a month, and requiring all correspondence between them to pass through his hands. The second daughter, then aged sixteen, addressed a letter to Mr. Justice Fry begging to be allowed the free exercise of her religion, and to be permitted to live with her mother. Ultimately a petition was presented by the mother and her daughter, asking that she might be allowed to spend two months with her mother, that the mother should have free access to her, and that the communication between them by letter should be free, &c. *Pearson*, J., dismissed the petition on the ground that in the absence of any fault by the father, the Court had no jurisdiction to interfere with his legal right, and the C.A., after an elaborate consideration of the authorities, upheld his decision (c).

In *Re McGrath* (d), a Roman Catholic tailor married a wife of the same faith. There were five children, all baptised Roman

(a) 34 C. D. 317, and *supra*.

(c) See *Re Agar-Ellis*, 24 C. D. 317.

(b) See *Stourton v. S.*, 8 De G. M. & G. 760.

Cf. *Re Newton*, *supra*, p. 519.

(d) (1893) 1 Ch. 143.

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Catholics, aged respectively, at the hearing of the appeal, a boy sixteen, three girls, fifteen, thirteen, and eleven, and a boy of six. The boy during his father's life was sent to an industrial Protestant home. The girls were educated principally at Roman Catholic schools. After the father's death the mother, who professed herself a Protestant and who was in very poor circumstances, appointed, under the Guardianship of Infants Act, 1886 (*a*), a Protestant lady who had befriended her as guardian of the girls and the youngest boy, and then died. The guardian placed the girls at a Protestant industrial home. A next friend of the infants took out a summons under the Act and the Custody of Children Act, 1891 (*infra*, p. 533), asking that the guardian appointed by the mother might be removed and other guardians appointed, and for directions as to the religious education of the infants. The evidence showed that the father had been absolutely indifferent in the matter of religion, and the eldest boy made an affidavit that he was and intended to remain a Protestant, and the eldest girl wished to remain where she was. *North, J.*, dismissed the summons, being of opinion that it would not be for the welfare of the child to remove the guardian and refused to give directions as to the religious education of the infants. The C.A. upheld his judgment, pointing out that it was now clear that the Court had jurisdiction to interfere with and remove the guardians of children who have no property, on proof of misconduct, or on its being shown it was for the infant's welfare, although in such cases the jurisdiction is limited by the fact of there being no property out of which the Court can provide maintenance: That the jurisdiction may be invoked by any person as next friend of the infant's, but that no next friend, no relation, no kind or charitable person, no co-religionist of the child, no priest or minister of any religion, has in such a case any right whatever beyond that of informing the Court as to what is wrong and asking the Court's assistance on behalf of the infant. The Court also pointed out the distinction between the present case and that of *Hawksworth v. H.* (*b*), where there was not the slightest trace of any indifference on the part of the father to the religious education of his child (*c*).

Powers of Divorce Court as to Custody, &c.—The jurisdiction of this Court as to the custody, maintenance, and education of the children of parents divorced or judicially separated depends upon the Divorce Acts (*d*), and the exercise of it upon the Judicature Act.

(*a*) 49 & 50 Vict. c. 27, *infra*, p. 531. *Re Clarke*, 21 C. D. 821.

(*b*) 6 Ch. 542.

(*d*) 20 & 21 Vict. c. 85, s. 35; 22 &

(*c*) Cf. *Re Newton*, *supra*, p. 519; 23 Vict. c. 61, s. 4.

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1873 (a), and this Court now has power to make orders for the custody, &c., of children up to the age of twenty-one years (b).

Enforcing Order as to Custody.—The order, if disobeyed, may be enforced by directing the Sergeant-at-Arms to take the infant into his custody (c).

7. Foreign Guardians and Guardians appointed for Foreign Infants.

The Courts will, if necessary, appoint guardians of an infant not domiciled and having no property in this country (d). "If there be a foreign child in England with guardians duly appointed in the child's own country, the Court of Chancery may, without any previous inquiry whether the appointment of other guardians in England is or is not necessary, and would or would not be beneficial to the child, make an order for the appointment of English guardians" (e). The status of guardian not being a status recognised by the law of this country, unless constituted in this country, it is not a matter of course to appoint the foreign guardian to be English guardian (f). Some one within the jurisdiction would generally be appointed, over whom the Court could exercise an effective control (g).

In dealing with guardians appointed by foreign Courts, the Courts will have regard to the principles of international law, and will recognise the proceedings of the regularly constituted tribunals of civilised communities. They will, therefore, carry out the orders of a foreign Court, provided they do not conflict with our own laws, and will remove guardians appointed here who do not carry out such orders; as, for instance, by bringing up a child being a subject of the country to which such Courts belong, in a religion not authorised by them (h).

For the same reason, the Court will not interfere with the discretion of the guardian who has been appointed by a foreign Court of competent jurisdiction, when he wishes to remove foreign infants from England in order to complete their education in their own country. But, nevertheless, the Court will not discharge an order by which guardians have been appointed over the children in this

(a) s. 25, and s.s. 10.

(b) *Thomasset v. T.*, (1894) P. 295; *Judkins v. J.*, 40 Sol. Jo. 729.

(c) *G. v. L.*, (1891) 3 Ch. 126; *Seton* (1893), F. 3, p. 889.

(d) *Johnstone v. Beattie*, 10 Cl. & Fin. 42; *Hope v. H.*, 4 De G. M. & G. 428; *Re Willoughby*, 30 C. D. 324.

(e) Per Lord Campbell, in *Stuart v.*

Bute, 9 H. L. Cas. 440, 464; see also *Nugent v. Vetzera*, 2 Eq. 704; *Seton* (1893), Form 12, p. 882.

(f) *Stuart v. Bute*, supra, p. 470.

(g) *Johnstone v. Beattie*, and *Stuart v. Bute*, supra; and see *Ex p. Watkins*, 2 V. 470.

(h) *Di Savini v. Lonsada*, 18 W. R. 425; *Re Bourgoise*, 41 C. D. 310.

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country: and will merely reserve to the foreign guardian the exclusive custody of the children to which he was entitled by order of the Court of his own country, and will on proper application allow the foreign guardian to remove them from the jurisdiction (*a*).

8. Powers under Statutes.

An Act to amend the Law as to the Custody of Infants. 36 & 37 Vict. c. 12.

1. From and after the passing of this Act it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age (*b*), to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the Court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the Court shall direct: and further, to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said Court shall deem proper (*c*).

2. No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother (*d*): Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto (*e*).

By the third section, Talfourd's Act, 2 & 3 Vict. c. 54, is repealed.

The Guardianship of Infants Act, 1886. 49 & 50 Vict. c. 27.

2. On the death of a father of an infant, and in case the father shall have died prior to the passing of this Act, then, from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by

(*a*) *Nugent v. Vetzera*, 2 Eq. 704; cf. *Dawson v. Jay*, 3 De G. M. & G. 764; *Re Bourgoise*, *supra*.

(*b*) See sect. 3 of following Act (1886).

(*c*) In *Re Taylor*, 4 C. D. p. 159, *Jessel, M.R.*, considers the principle which should guide the Court in the

application of this Act. Cf. *Re Elderton*, 25 C. D. 220; *Re Brown*, 13 Q. B. D. 614; *Smart v. S.*, (1892) A. C. p. 434.

(*d*) See cases cited *note (d)*, p. 498, and *Condon v. Vollum*, 57 L. T. 154.

(*e*) *Re Besant*, 11 C. D. 508.

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the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, and if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother (a).

- 3 (1.) The mother of any infant may, by deed or will, appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and when guardians are appointed by both parents they shall act jointly.
- (2.) The mother of any infant may, by deed or will, provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the Court after her death, if it be shown to the satisfaction of the Court that the father is unfitted to be the sole guardian of his children, may confirm (b) the appointment of such guardian or guardians, who shall thereupon be authorised and empowered so to act as aforesaid, or make such other order in respect of the guardianship as the Court shall think right.
- (3.) In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the Court for its direction, and the Court may make such order or orders regarding the matters in difference as it shall think proper.

4. Every guardian in England and Ireland under this Act shall have all such powers over the estate and the person, or over the estate (as the case may be), of an infant as any guardian appointed by will or otherwise now has in England under the Act 12 Car. 2, c. 24, or in Ireland under the Act of the Irish Parliament 14 & 15 Car. 2, c. 19, or otherwise.

5. The Court (c) may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the

(a) This Act does not affect the father's right to decide as to the religious education of his child, *Re Scanlan*, 40 C. D. 200. See *Re Magces*, 31 L. R. Ir. 513, and note (f), p. 496.

(b) Form 7, Seton (1893), p. 880:

Re G., (1892) 1 Ch. 292.

(c) If the Divorce Court has seisin of the matter the application should be made to it, *Manders v. M.*, 63 L. T. 627; *Witt v. W.*, (1891) P. 163.

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infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just (*a*).

6. In England and Ireland the High Court of Justice, in any division thereof, and in Scotland either division of the Court of Session, may, in their discretion, on being satisfied that it is for the welfare (*aa*) of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed (*b*).

7. In any case where a decree for judicial separation, or a decree either nisi or absolute for divorce, shall be pronounced, the Court pronouncing such decree may thereby declare (*c*) the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children (*d*).

The remaining six sections provide (sect. 9) that the "Court in England shall mean the High Court, or the County Court of the district in which the respondent resides," and makes similar provision as to Scotland and Ireland. Sect. 10 provides for removals and appeals from County Courts. Sect. 11 provides that Rules shall be made, see *Annual Practice*, 1897, Vol. 2. Sect. 12 defines "Tutors" in Scotland; and Sect. 13 saves the jurisdiction of the Courts as to the appointment and removal of guardians.

The Custody of Children Act, 1891. 54 & 55 Vict. c. 3.

1. Where the parent of a child applies to the High Court or the Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of

(*a*) This extends sect. 1 of the Act of 1873, ante.

(*aa*) Cf. *Smart v. S.*, (1892) A.C. p. 436.

(*b*) *Re McGrath*, (1893) 1 Ch. 143.

(*c*) *Handford v. H.*, 63 L. T. (N. S.) 256; *Webley v. W.*, 64 L. T. 839;

Hitchings v. H., 67 L. T. 330. Cf. *Witt v. W.*, *Manders v. M.*, supra.

(*d*) This power is in addition to that under the Matrimonial Causes Act, 1859. *Webley v. W.*, 64 L. T. 839; *Hitchings v. H.*, 67 L. T. 330.

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the child, the Court may in its discretion decline to issue the writ or make the order (a).

By sect. 2 the Court has power to order the parent to repay any costs properly incurred in bringing up the child.

3. Where a parent has—

(a) abandoned or deserted his child; or

(b) allowed his child to be brought up by another person at that person's expense, or by the guardians of a poor law union, for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties; the Court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child.

4. Upon any application by the parent for the production or custody of a child, if the Court is of opinion that the parent ought not to have the custody of the child, and that the child is being brought up in a different religion to that in which the parent has a legal right to require that the child should be brought up, the Court shall have power to make such order as it may think fit to secure that the child be brought up in the religion in which the parent has a legal right to require that the child should be brought up. Nothing in this Act contained shall interfere with or affect the power of the Court to consult the wishes of the child in considering what order ought to be made, or diminish the right which any child now possesses to the exercise of its own free choice.

5. For the purpose of this Act the expression "parent" of a child includes any person at law liable to maintain such child or entitled to his custody, and person includes any school or institution.

"*Liable to maintenance*."—There is no legal obligation on the part of a father to maintain his child unless the neglect to do so bring him within the criminal law. Civilly there is no such obligation (b).

And the mother is not liable at law (c), but she is under the Married Women's Property Act and other Acts (d).

(a) This Act gives the Court a judicial discretion to disregard the wishes of the parent. Cf. *Reg. v. Barnardo*, (1891) 1 Q. B. 194; *Reg. v. Gyugall*, (1893) 2 Q. B. 232.

(b) See *Bazeley v. Forder*, L. R. 3 Q. B. p. 565; *Simpson, Infants* (1890), p. 171; and 43 Eliz. c. 2, s. 7; 4 & 5 Will. 4, c. 76, s. 57, Lely's Statutes,

tit. "Poor;" 35 & 36 Vict. c. 65, *ibid.*, tit. "Bastardy."

(c) *London School Board v. Wood*, 15 Q. B. D. 415.

(d) See 45 & 46 Vict. c. 75, s. 21; as to both parents, 31 & 32 Vict. c. 122, s. 37; 52 & 53 Vict. c. 56, Lely's Statutes, tit. "Poor."

HUSBAND AND WIFE.

SCOTT v. TYLER.

1787. 1788. 2 Bro. Ch. 431; 2 Dick. 712.

Conditions in Restraint of Marriage.—Public Policy.

Legacy to a daughter, one moiety of which was to be paid to her at twenty-one, if then unmarried, and the other moiety at twenty-five, if then unmarried; but in case she married before twenty-one, with the consent of her mother, to be settled upon her as mentioned in the will. The daughter married under twenty-one, without the consent of her mother: Held, that the legacy did not vest in the daughter upon the marriage, and that she never came under the description to which the gift of the legacy was attached.

RICHARD KEE (*a*), the putative father of the plaintiff Margaret Christiana Scott, by his will devised as follows:—"I will that my executors, hereinafter named, do, with all convenient speed after my decease, purchase the sum of 5,000*l*. South Sea Annuities 1751, in their names, upon trust that they, or the survivors or survivor of them, do stand possessed thereof, and receive the dividends from time to time as the same shall grow due, and thereout pay and apply the sum of 60*l*. yearly, and every year, in and towards the maintenance and education of my grandson, Richard Dyer till he shall arrive at the age of fifteen years; and if my said grandson should then choose to go to the university, from thenceforth to pay and apply 120*l*. per annum in and towards his said maintenance and education at the university; but if my said grandson shall not go to the university, I will that, out of the sum of 5,000*l*. and the dividends and savings arising thereon then made, a sum not exceeding 400*l*. be

(*a*) The statement of the case and arguments are taken from 2 Bro. Ch. 431; the judgment from 2 Dick. 712. The statement, arguments, and judg-

ment have been abridged, and so much of them as relate to the power of an executor to pledge property has been omitted.

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applied in placing out my said grandson to any trade, profession or employment he may, with the approbation of my executor, choose. And my will and meaning is, that the surplus dividends, if any, over and beside such allowances as aforesaid, from time to time be invested in the like South Sea Annuities, and that the said *capital sum, with such surplus dividends, be transferred to my said grandson at his age of twenty-one years, if he shall be living, but if he shall die before that age, I give the said annuities between Mrs. Elizabeth Tyler, who now lives with me, and my god-daughter, Margaret Christiana Tyler, equally to be divided between them, share and share alike, but the share of my god-daughter not to be transferred to her till twenty-one. And if she shall die before her arrival at that age, I give her share to the said Elizabeth Tyler, for her own use and benefit.* Also I will that my executors hereinafter named, do, with all convenient speed after my decease, purchase the sum of 10,000*l.* South Sea Annuities, 1751, in their names, upon the trusts after mentioned, that is to say, upon trust that they and the survivor and survivors of them do stand possessed thereof, and out of the dividends pay or permit the said Elizabeth Tyler to take or receive yearly, and every year, as the same shall become payable, the sum of 100*l.* for the maintenance and education of my said god-daughter, Margaret Christiana Tyler, until her age of twenty-one years, which will be on the 18th of June, 1755, and add the surplus of such dividends from time to time to the said capital stock; and at her said *age of twenty-one years, I will that one moiety of the said capital stock of 10,000*l.* and the savings thereof, be paid and transferred to my said god-daughter, in case she shall then be unmarried; and that, at her age of twenty-five years, if she shall be then unmarried, I will that the other moiety of the said 10,000*l.* be then transferred to her for her own use and benefit; but in case my said god-daughter shall marry before her said age of twenty-one years, with the consent of her said mother, Elizabeth Tyler, I will that one moiety of the said 10,000*l.*, with the savings made, be settled on my said god-daughter, for her separate use, and her issue, in such manner as her said mother, Elizabeth Tyler, shall think proper, and the other moiety thereof, with the surplus dividends, disposed of, as she, my said god-daughter, shall think fit; but in case my said god-daughter shall depart this life before her arrival at the age of twenty-five*

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*years, unmarried, then, and in such case, I give the said 10,000*l.* to her said mother, Elizabeth Tyler, for her own use and benefit. I give, devise, and bequeath to my executors, and to their heirs, all my freehold messuages or tenements, with the appurtenances, in Denmark Court in the Strand, being Nos. 2, 3, 4, and 5, in trust that they and the survivor of them, and the heirs and assigns of such survivor, do from time to time receive the rents and profits thereof, and lay out the same in government securities, to the use of my aforesaid god-daughter, Margaret Christiana Tyler, till her age of twenty-one years; and from and after her attaining that age, I give the said messuages, and the rents, issue, and profits received by my said executors in the mean time, to my said god-daughter, her heirs, executors, administrators, and assigns, for ever: but if my said god-daughter shall depart this life before she shall attain the age of twenty-one years, I give and devise the said messuages, or tenements and premises, to my said grandson, Richard Dryer, if living, his heirs and assigns; but if dead, I give and devise the same to the said Elizabeth Tyler, her heirs and assigns for ever."* He then gave other dispositions not material to this case and appointed *the aforesaid Elizabeth Tyler, George Shakspeare the elder, Charles Malver, and Philip Nind, his executors and trustees.*

In 1774, James Cockburn left to the plaintiff Margaret Christiana Tyler a legacy of 100*l.*, and made the defendant Tyler executrix and Richard Kee died in September, 1776, without revoking his will. The plaintiff Samuel Scott, about the latter end of 1782, paid his addresses to the other plaintiff, Margaret Christiana, and by her consent made proposals to the defendant Elizabeth Tyler relative to a marriage with her daughter, offering to settle her own fortune, together with a reasonable part of his own, upon the marriage, which proposal was rejected by the defendant; but on the 17th of May, 1783, he married the other plaintiff, Margaret Christiana *without her mother's consent.*

In 1786, Elizabeth Tyler became a bankrupt.

The original and supplemental bill prayed (amongst other things) that the right of Margaret Christiana to the 10,000*l.* South Sea Stock might be declared, and the same settled on the marriage.

The defendant Elizabeth Tyler by her answer denied that the marriage of the plaintiff was by her consent, and insisted, that for want of performance of that condition, the plaintiff Margaret

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Christiana had forfeited her legacy of 10,000*l.* South Sea Annuities which had fallen into the residuary estate of the testator.

The case was argued on three days in Easter and three in Trinity Term, 1787.

Mr. *Mansfield*, for the plaintiffs. — Margaret Christiana Tyler, having married under her age of twenty-one, is entitled to the legacy of 10,000*l.* If she married under that age, a moiety was to be settled on the marriage, the other to be paid as she should direct. She, having married, is therefore become entitled to it. It is objected that she is not entitled, because her marriage with the other plaintiff was not with the consent of her mother, whose consent was made necessary by the testator's will. The doctrine of our law is, that wherever there is a personal legacy or a portion payable out of money only, and not out of land, and a condition is annexed of not marrying without consent, the clause restraining marriage is construed to be *in terrorem* only, and void; and it is immaterial whether the condition be precedent or subsequent. In this point our law follows the civil law, as far as personal property is concerned. He cited the cases mentioned below (a).

Mr. *Scott* (b), on the same side. — Independently of the clause containing the condition of marrying with consent, it may be argued, that the testator intended the legatee to have the 10,000*l.* in every event except one; namely, that of her dying unmarried under the age of twenty-five years, which, by her marriage, is now become impossible. On the authorities, it is clear, that this being a personal legacy, the condition, as far as it requires the consent of Mrs. Tyler, is *in terrorem* only, and therefore void in law; and that, in fact, the condition, as far as it is legal, is complied with by the marriage. He cited the cases and authorities mentioned below (c).

Mr. *Alexander*, on the same side.

(a) *Hervy v. Aston*, Cas. t. Talb. 212, 1 Atk. 361, and Comyn's Rep. 726; *Reynish v. Martin*, 3 Atk. 330; *Elton v. E.*, 1 Wils. 159.

(b) Afterwards Earl of Eldon.

(c) *Long v. Dennis*, 4 Burr. 2052. Godolph. Orphan's Leg. b. 1, c. 15; Godolph. b. 3, c. 17; *Swinburne*, b. 4.

c. 12, p. 266; *Wheeler v. Bingham*, 1 Wils. 135; *Piggott v. Morriss*, Sel. Ch. Cas. 26, 2 Eq. Cas. Abr. 214; *Underwood v. Morris*, 2 Atk. 184; *Semphill v. Baly*, Pr. Ch. 562; *Garbut v. Hilton*, 1 Atk. 381; *Bellasis v. Ermine*, 1 Ch. Cas. 22.

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Mr. *Hardinge*, for the defendant Elizabeth Tyler and her assignees. — (1.) One of the four alternative contingencies upon which the daughter's interest is to depend, and which alone can found her claim to the limitation of this entire sum for her benefit, is not accomplished. She has not "married before the age of twenty-one with her mother's consent." The alternative, respecting this marriage with consent, is not merely formal, nor is it by way of substitution for other alternatives, and with an equal benefit annexed, but substantially different, and with additional benefit. She is to attain the age of twenty-one—a mere contingency of time—or she is to attain it unmarried; or she is to attain the age of twenty-five before marriage; or she is to marry with her mother's consent under the age of twenty-one. Upon every one of these alternatives after the first, her state is improved. In the first event, she is to have certain freehold houses. In the second, she is to have an immediate 5,000*l*. In the third, she is to have an additional 5,000*l*. In the fourth, she is to have 10,000*l*. before the age of twenty-one; but 5,000*l*. is to be settled upon the marriage. The fourth contingency, interposing its earlier effects, saves the legatee from the restraint of the other stipulations, and by an act very much in her own power. The will does not compel her to be unmarried, or to wait for the age of twenty-five, or even that of twenty-one before her marriage; for she is only to marry with her mother's consent before twenty-one and the 10,000*l*. is from that instant her own.

(2.) There is no condition respecting marriage after the age of twenty-five; and there is no condition requiring consent after the age of twenty-one. The contingency of time is definite: but, coupled with a condition essential to its benefit, or indefinite, except as falling within a certain period, but so as to admit of being defined by the performance of a condition,—the marriage with consent. The will may be construed as if the words had been "when she has attained the age of twenty-five unmarried, or when she has married before twenty-one, with her mother's consent."

(3.) There is no direct legacy to the daughter. The gift is to executors; and they are to pay at the several periods for her benefit.

(4.) She has a sure provision if she arrives at the age of twenty-one, married or unmarried, and married with or without consent.

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(5) Upon failure of the other events described, there is a marked and clear limitation over to the mother. But it is argued, that, upon the failure of this event (*i.e.* of the marriage before twenty-one, with consent), no limitation over to the mother appears in the will; and it is true, that, in terms, no such limitation is to be found. But there is a limitation over of the whole 10,000*l.* directly to the mother, in the very next clause to this, upon the event of the daughter's death before twenty-five unmarried; and she, the mother, is residuary legatee.

Mr. *Hargrave* (a), for the assignees of Mrs. Tyler.—Concerning the 10,000*l.* claimed by Mr. and Mrs. Scott, which is a question of great importance, as it involves the general doctrine of the Court as to gifts on condition of marriage being merely *in terrorem*.

Under the will in question, Mr. and Mrs. Scott claim, in Mrs. Scott's right, the legacy of 10,000*l.* South Sea Annuities, and found their claim thus:—That Mrs. Scott having married under twenty-one years of age, the material part of the contingency in Mr. Kee's will respecting the legacy has taken effect, and, therefore, that she is entitled to the Stock, with the accumulation of interest. Against this the assignees contend that she is not so entitled, because she has married without the consent of her mother.

The case has been argued on behalf of the plaintiffs in two ways:—First, that Mrs. Scott's title has accrued within the contingencies under the will. Secondly and principally, that the condition in the will, as far as it requires marriage with consent of the mother, is a condition *in terrorem* only, and, as such, null and inoperative.

With respect to the first point, it is not much relied upon; the true answer to it will be to state the contingencies. The first contingency is, that upon her attaining her age of twenty-one, a moiety of the Stock shall be transferred to her, in case she should be then unmarried; the event is, that at twenty-one she was, and still is, married to Mr. Scott: this contingency, therefore, has not happened. The next contingency is her attaining twenty-five, and being then unmarried, when the remaining moiety is to be transferred; but to this there is a double answer,—she has not yet attained twenty-five, and she is married. The third contingency is, her marrying under

(a) See *Harg. Jur. Arg.* vol. i. p. 22.

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twenty-one with the consent of her mother; but this contingency neither has happened nor ever can happen; for she married under twenty-one without consent, and has continued married till after her age of twenty-one. These are the only contingencies in the will, and are so framed that no one of them is complied with.

As to the second and great point in the cause, namely: that it is the rule of the Court, in cases of legacies of personal property, to consider conditions in restraint of marriage as merely *in terrorem*, unless where, upon the breach of the condition, the legacy is expressly devised over to a third person. That such a rule should ever have existed appears wonderful; and if the authorities were out of the case, the rule could not be supported.

The Roman law is the foundation of this rule, for it rejected such conditions as invalid; our Ecclesiastical Courts followed this rule, and when the Courts of equity assumed a concurrent jurisdiction over legacies, they held themselves bound to adopt the same rules (*a*).

Although it cannot be denied to be the law of the Court, yet the Court will not carry it an iota beyond its limits, and should resist its application to such a case as the present, on the following grounds, which the learned Counsel argued very fully, namely:

That the doctrine is inapplicable where the condition of marriage is precedent; that the residuary devise in the present case is a sufficient devise over; that the doctrine ought to be confined to immediate and direct legacies, and not to include a trust engrafted upon them; under which latter denomination the legacy in question must be admitted to be.

Mr. *Stratford*, on the same side.

Mr. *Mansfield*, in reply.—The question is that made on the will, whether this gift to the plaintiff Mrs. Scott is or is not, a simple gift of the money in one of two events, or whether she was, at all events, to have the money in case she married. The first gift in the will is that to Dryer, of 5,000*l.*, payable when he should attain the age of

(*a*) Reference was here made to the Lex Papia Poppæa. See Heineccius in legem Papiam Poppæam: 4to, 1726, p. 94. And see an ample commentary on this chapter of the law in the same book, p. 298.

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twenty-one; if he should die under that age, it was to be divided between the defendant Elizabeth and the plaintiff Margaret Christiana, and if the latter died under twenty-one, it was to go wholly to the defendant Elizabeth. Then comes the bequest upon which the question arises: he directs his executors to purchase 10,000*l.* South Sea Annuities, and gives a direct order that the interest (except the 100*l.* a year maintenance) should accumulate until the plaintiff should attain her age of twenty-one years, then the accumulation was to stop, and half of the stock, and all the savings, were to be paid to her, and at twenty-five the other moiety was to be paid. Then comes the provision for her marrying under twenty-one, and the gift of the stock over to the mother, in case she should die under twenty-five, unmarried. He then proceeds to give her the houses at twenty-one, and if she dies under that age he gives them to Dryer, and then to the River Lee Bonds, which he gives to the plaintiff at twenty-one, and if she dies under that age he gives them to the mother, the defendant Elizabeth. He afterwards gives several legacies, and gives the residue to the defendant Elizabeth Tyler. It is a mere blunder by which the legacy is made to vest at twenty-five; he understands and means that she shall have it at twenty-one, if married: but if married before twenty-one, with consent, he meant to accelerate it, and that she should not, in that case, wait till she attained twenty-one. The provisions as to twenty-one and twenty-five are a restraint of the precedent gift of the moiety and savings at twenty-one, at which age he gives her everything else—the houses, the River Lee Bonds, and the contingency in Dryer's legacy of 5,000*l.*

If this be the fair construction, there is no pretence to say the legacy is forfeited by the marriage. On the fair construction, therefore, of the will, according to the true intent of the testator, if she was married she was to have the whole at twenty-one, and the provision in restraint of marriage is as such *in terrorem* only.

If, however, the testator has expressed himself so imperfectly, that she is obliged to get rid of the objections which have been raised to the legacy, we must consider what has been said on the several points.

There is no distinction between conditions precedent and conditions subsequent, except with respect to lands, or where there is a devise

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over; and in all other cases a condition in restraint of marriage is void. In reasoning, subsequent conditions ought just to prevail as much as precedent ones: but the doctrine is established, and it is too late to correct it, at least with respect to subsequent conditions. It is contended, however, that the authorities are different as to precedent conditions; but the authorities put precedent conditions out of the way as much as subsequent ones. The doctrine is adopted from the civil law. They contend the civil law has been misunderstood, and that we are now to give it a new construction. But if there is any error in the manner in which the civil law has been construed, the time for correcting that error is past; the doctrine is now established too strongly to be moved; it has become the law of the Court, and the question only can arise, how it has been understood and adopted. It is of no avail to understand it better than those who adopted and established the rule have done. But, in fact, the civil law does not admit the distinction between precedent and subsequent conditions. What is the difference taken on the other side between these conditions? That precedent conditions are favoured and must prevail; that subsequent ones must be rigorously construed as to their validity, and may be dispensed with where compensation can be made. At law there is no distinction between conditions precedent or subsequent, if the subsequent condition is broken.

It has been endeavoured, on the other side, to bring in the devise over; and they have argued, that, being given to the plaintiff in three events, that in all others the legacy goes to Mrs. Tyler. A devise over exists only where there is a gift to one, if he marry or do any other act; with a gift, if he does not, to another person. A residuary bequest does not amount to a devise over. There is no devise over here, but what there is in every case where there is not an intestacy.

They contended, also, that here is an alternative provision. But the testator has said no such thing. The other gifts are without any reference to this legacy of 10,000*l.*: if the plaintiff had died under twenty-one, she would, according to their argument, have had nothing, for none of the other gifts vested before that time. There is not the least ground to say that here is an alternative within the

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meaning of *Gillet v. Wray*, where one thing is given in one event and another in another event.

Another ground of argument has been that the restraint is only till twenty-one, though there is a passage in Swinburne, where a restraint to twenty is said to be good; it is only given as his opinion; and although the point might have occurred in two or three of the cases—as *Annis v. Horner* and *Creagh v. Wilson*, where the restraints were only temporary,—yet it was not insisted upon in those cases; and although the restraint in *Underwood v. Morris* was only till twenty-one, yet the condition was held void, and not a hint given that the circumstance of its being confined in point of time would make any difference.

It is argued, moreover, that here the restraint was given to a parent. In the civil law, the mother could not be considered as a parent. Is there any possible distinction to be taken between a parent and a guardian? The law makes no such distinction, and reason and common sense agree in this with the law. In *Hervey v. Aston* the consent first required was that of the mother; but no distinction was made on that ground.

The objection that this is a trust is also perfectly new. If there is any ground for this distinction, another case must be added to the exceptions upon this subject, that a condition in restraint of marriage annexed to a legacy given in trust for the legatee, will be good, though if the legacy be given immediately to the legatee, it will be void. And this is a distinction expected to be adopted in a Court which says, that trust estates follow the nature of legal estates. Although the Ecclesiastical Court has not in general a jurisdiction over trusts, it is by no means clear that that Court may not compel the executor to pay the legacy to the party actually entitled; and when the executor is himself the trustee, that Court may undoubtedly compel him to pay it, as he in that case only is what he is in all cases—a trustee for the legatee.

The cause stood over to the 20th of December, 1788, when it came on for judgment (a).

(a) This judgment is from 2 Dick. 712. Mr. Dickens states in a note, that Lord Thurlow having read his judgment,

which was written, gave it to him, and that the following was correctly copied from it.

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LORD CHANCELLOR THURLOW.—This is a bill filed by Samuel Scott and Margaret Christiana his wife, against Elizabeth Tyler, the residuary legatee and executrix of Richard Kee, George Shakespeare Charles Mahew, and Philip Nind, executors and trustees named in the will of the same Richard Kee, and Richard Dyer, his lien-at-law.

The bill prays that the plaintiff Margaret Christiana's right may be established in a trust fund of 10,000*l.* South Sea Annuities, and that proper accounts may be directed accordingly.

For this purpose the bill states the will of Richard Kee, made on the 16th day of December, 1776, whereby he directs his executors to purchaser 5,000*l.* South Sea Annuities, of the year 1751, in their own names, but in trust to pay 60*l.* per annum for the maintenance of Richard Dyer till his age of fifteen, and from thenceforward 120*l.* per annum, with liberty to raise 400*l.* to put him out in some trade or profession, the surplus profits to be invested in the like Annuities, and the whole to be transferred to him at twenty-one; but if he dies in the meantime, the whole is to be thereupon divided between the defendant Elizabeth Tyler and the plaintiff Margaret Christiana, the share of Margaret Christiana not to be transferred to her till her age of twenty-one, and if she dies sooner, her share is to go over to Elizabeth.

He also directs his executors to purchase the sum of 10,000*l.* in the like Annuities, in their own names, in trust to pay Elizabeth Tyler 100*l.* per annum for the maintenance of Margaret Christiana till her age of twenty-one, the surplus to be laid out in the meantime in the like Annuities; at her age of twenty-one, if then unmarried, one moiety is to be transferred to Margaret Christiana, for her own use and benefit; and at her age of twenty-five, if then unmarried, the remainder to be transferred in like manner.

If she marries with the consent of Elizabeth, before twenty-one, a moiety of the whole sum is to be settled to her separate use, and for her issue, according to the discretion of Elizabeth, the other moiety to be disposed of as Margaret Christiana shall think fit; if she dies unmarried, before her age of twenty-five, the whole is to go over to Elizabeth.

He also gives to the same trustees certain freeholds in Denmark Court, in trust to lay up the rents till Margaret Christiana shall attain twenty-one, whereupon he gives both the estates and the

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produce to her absolutely ; or if she dies sooner, to Richard Dryer, or if he be then dead, to Elizabeth Tyler.

He gives divers other legacies. All the rest of his estate, real and personal, he gives to Elizabeth Tyler, absolutely, whom he looks upon as a wife.

He died on the 3rd of November, 1776, leaving Elizabeth surviving, and Margaret Christiana, his natural daughter by her.

On the 17th of May, 1783, the plaintiff Samuel Scott clandestinely and against the will of Elizabeth, married Margaret Christiana, then an infant of eighteen years. Elizabeth objected to it as an improvident match, by reason of his inferior circumstances, his advanced age, and the family which he had by one of his former wives, and warned her daughter of the consequence.

And, as the plaintiff Samuel Scott states, by a deed of 13th of May, 1783, he has covenanted to settle Margaret Christiana's fortune on her and her children, after his own death, if she or they should survive him.

The bill further states the will of James Cockburn, who died in October, 1774, leaving Elizabeth Tyler his executrix, and Margaret Christiana a legatee of 100*l*.

All the executors proved Richard Kee's will ; Elizabeth Tyler alone acted.

Elizabeth Tyler forthwith transferred 5,000*l*. South Sea Annuities into the names of the trustees, which have been since transferred to Dryer, together with the accumulations, and that legacy has been duly discharged.

In August, 1777, she transferred 10,000*l*. South Sea Annuities into the names of herself and co-trustees, together with the further sum of 1,000*l*. of like Annuities, whereof she has constantly received the produce ; she received, in like manner, the rents of the freehold houses and the interest of the securities on the River Lee.

She admits the legacy of 100*l*. to remain due, and that she had assets, but claims a debt of 900*l*. against the plaintiff Samuel Scott.

In March, 1786, Elizabeth Tyler became a bankrupt : a commission issued, and Sir Edward Vernon, Thomas Hankey, John Marr, and Malcolm Cockburn, were chosen assignees.

Upon this matter questions arise, whether, as the case stands,

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the plaintiffs have any and what interest in the 10,000*l.* South Sea Annuities.

The testator makes four several bequests to his daughter: a contingent interest in the 5,000*l.* South Sea Annuities originally given to Dryer, the 10,000*l.* South Sea Annuities in question, the freehold tenements, and the Lee Bonds, all upon the event of her living till the age of twenty-one, married or unmarried. If she dies before twenty-one, the first, third, and fourth bequests take no place, and yet the interest of the fourth is to be paid to her separate use, notwithstanding her coverture during her infancy; but there is an event upon which the second bequest may take place before twenty-one, namely, *if she marries before that age with the consent of her mother.*

It is impossible not to suspect that the testator has failed of expressing his full intention concerning this bequest of the 10,000*l.* He gave it to the daughter on a double contingency,—her age, and being then unmarried; he seems to have meant it for the mother on the contrary event: but he has given it over also to her on a double contingency,—the death of the daughter before her age, and unmarried. This leaves a middle case,—the premature marriage of the daughter,—in which neither can claim under the form of this bequest. Again, he has provided for the anticipation of the daughter's title, by another double contingency; namely, *marriage before twenty-one and with consent of the mother*; but, in case of a marriage between twenty-one and twenty-five, with or without consent, half the legacy would remain undisposed of; which it can hardly be imagined he meant.

Some endeavours were used to infer, from the terms in which it was given to the mother, that, in all other events, it was meant for the daughter; it is more probable, that, in the case of the daughter's not becoming entitled, it was meant for the mother; but neither conjecture is sufficiently collected from the actual expression, by any admissible rules of interpretation.

The main argument for the plaintiff turned on this proposition, that one branch of the contingency upon which the legacy was given (or rather anticipated), implied a condition in restraint of marriage, which is merely void, and consequently the legacy became absolute.

In support of this position, innumerable decisions of this Court

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were quoted; but the cases are so short, and the dicta so general, as to afford me no distinct view of the principle upon which the rule is laid down, or, consequently, of the extent of the rule, or of the nature of the exceptions to which its own principle makes it liable.

The earlier cases refer in general terms to the canon law, as the rule by which all legacies are to be governed. By that law undoubtedly all conditions which fell within the scope of this objection,—the restraint of marriage,—are reputed void, and, as they speak, *pro non adjectis*. But those cases go no way towards ascertaining the nature and extent of the objection.

Towards the latter end of the last and beginning of the present century, the matter is more loosely handled. The canon law is not referred to (professedly at least) as affording a distinct and positive rule for annulling the obnoxious conditions; on the contrary, they are treated as partaking of the force allowed them by the law of England. But in respect of their importing a restraint of marriage, they are *treated at the same time as unfavourable, and contrary to the common weal and good order of society*. It is reasoned that parental duty and affection are violated when a child is stripped of its just expectations: that such an intention is improbably imputed to a parent, particularly in those instances where there was no misalliance, as in marriage with the houses of *Bellasis* (a), *Bertie* (b), *Cecil* and *Semphill* (c), which the parent, had he been alive, would probably have approved. These ideas apply indifferently to bequests of land and of money, and were, in fact, so applied in one very remarkable case; nay, to avoid the supposed force of these obnoxious conditions, strained constructions were made upon doubtful signs of consent, and every mode of artificial reasoning was adopted to relax their rigour. This was thought more practicable by calling them conditions subsequent, although, if that had made such difference, they were, and indeed, must have been generally, conditions precedent, as being the terms on which the legacy was made to vest. At length it became a common phrase, that such conditions were only *in terrorem*. I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never

(a) *Bellasis v. Ermine*, 1 Ch. Ca. Ca. 129.

22.

(c) *Semphill v. Bayly*, Pr. Ch. 562.

(b) *Bertie v. Lord Falkland*, 3 Ch.

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meant should happen; but the Court disposed of such conditions so as to make them amount to no more.

On the other hand, some provision against improvident matches, especially during infancy, or to a certain age, could not be thought an unreasonable precaution for parents to entertain. The custom of London has been found reasonable, which forfeits the portion on the marriage of an infant orphan without consent (*a*). The Court of Chancery is in the constant habit of restraining and punishing such marriages; and the Legislature (*b*) has at length adopted the same idea, as far as it was thought general regulation could in sound policy go.

In this situation the matter was found about the middle of the present century, when doubts occurred which divided the sentiments of the first men of the age. The difficulty seems to have consisted principally in reconciling the cases, or rather the arguments, on which they proceeded. The better opinion, or, at least, that which prevailed, was, that devises of land, with which the canon law never had any concern, should follow the rule of the common law; and that legacies of money, being of that sort, should follow the rule of the canon law.

Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands (though I do not find this yet resolved), follow the rule of the common law, and such trusts are to be executed by analogy to it.

Mere money legacies follow the rule of the canon law: and all trusts of that nature are to be executed with analogy to that.

But still, if I am not mistaken, the question remains unresolved, What is the nature and extent of that rule, as applied to conditions in restraint of marriage?

The canon law prevails in this country only so far as it hath been actually received, with such amplifications and limitations as time and occasion have introduced, and subject at all times to the municipal law. It is founded on the civil law: consequently, the tenets of that law also may serve to illustrate the received rules of the canon law.

By the civil law, the provision of a child was considered as a debt of nature, of which the laws of civil society also exacted the payment,

(*a*) *Foden v. Howlett*, 1 Vern. 354. (*b*) 26 Geo. 2. c. 33.

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insomuch that a will was regarded as inofficious, which did not in some sort satisfy it.

By the positive institutions of that law, it was also provided, *si quis calibatus, vel viduitatis conditionem hæredi, legatariove injunxerit; hæres, legatariusve è conditione liberi sunt; neque eo minus delatum hereditatem, legatumve, ex hac lege, consequantur* (a).

In amplification of this law, it seems to have been well settled, in all times, that if, instead of creating a condition absolutely enjoining celibacy, or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law, and treated accordingly; that is, the condition so imposed is holden for void.

Upon the same principle, in further amplification of the law, all distinction is abolished between precedent and subsequent conditions; for it would be an easy evasion of such a law, if a slight turn of the phrase were allowed to put it aside. It has rather, therefore, been construed, that the condition is performed by the marriage, which is the only lawful part of the condition, or by asking the consent: for that alone is a lawful condition: and, for the rest, the condition not being lawful, is holden *pro non adjectâ*.

On the other hand, the ancient rule of the civil law has suffered much limitation in descending to us.

The case of widowhood is altogether excepted by the Novels (b); and injunctions to keep that state are made lawful conditions.

So is every condition which does not, directly or indirectly, import an absolute injunction to celibacy.

Therefore, an injunction to ask the consent (c), as I have said before, is a lawful condition, as not restraining marriage generally.

A condition not to marry a widow is no unlawful injunction, for the reason given before.

So, of an annuity to a widow during her widowhood (d).

(a) Heineccius ad legum Papiam Poppæam, 1776, p. 294. And see the Commentary, p. 298.

(b) Novell. 22, c. 44.

(c) Sutton v. Jewke, 2 Ch. R. 9; Creagh v. Wilson, 2 Vern. 572; Ash-

ton v. A., Pr. Ch. 226; Chauncey v. Graydon, 2 Atk. 616; Hemmings v. Munkley, 1 Bro. Ch. 304; Dashwood v. Bulkeley, 10 V. 230.

(d) Jordon v. Holkam, Amb. 209; Barton v. B., 2 Vern. 308.

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A condition to marry, or not to marry, Titus or Mævia, is good, for this reason, that it implies no general restraint; besides, in the first case it seems to have a bounty to Titus or Mævia in view (*a*).

In like manner, the injunction which prescribes the due ceremonies, and the place of marriage, is a lawful condition, and is not understood as operating the general prohibition of marriage.

Still more is a condition good, which only limits the time to twenty-one (*b*), or any other reasonable age, provided this be not evasively used as a covered purpose to restrain marriage generally. And this must obtain still more forcibly where the *lex loci* implies the same restraint.

Nay, according to Godolphin, the use of a thing may be given during celibacy; for the purpose of intermediate maintenance will not be interpreted maliciously, to a charge of restraining marriage (*c*).

It seems also agreed on all hands, that when, on any condition, however restrictive of marriage, the legacy is given over to pious uses, the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectionable purpose of restraining marriage (*d*).

As we receive the canon law, a bequest over, to any purpose, or person, shall be interpreted in the same manner, and make a conditional limitation.

It was made a question, formerly, what a legatee should take on her marriage, under a bequest of 200*l.* if she married, or 100*l.* if she did not. Some thought 300*l.*, some 200*l.*, some 100*l.* In our books we find it determined formerly, in the case of a greater legacy given upon marriage with consent, or after a certain age, and a less in the other events, that the greater legacy was not forfeited by marrying against the condition (*e*); but those decisions happened in the period alluded to before, when the worth of the alliance was thought a sufficient reason for a favourable interpretation, as it was called, of the condition; but Lord Cowper determined otherwise, on alternative bequests (*f*).

(*a*) *Jervoise v. Duke*, 1 Vern. 19;
Randal v. Payne, 1 Bro. Ch. 55.

(*b*) *Stackpole v. Beaumont*, 3 V. 89.

(*c*) See *Webb v. Grace*, 2 Ph. 701,
reversing *S. C.* 13 Si. 384; *Morley v.*
Rennoldson, 2 Ha. 570, 580.

(*d*) *Swinb. Part 4. sects 12, 11.*

(*e*) *Hicks v. Pendavis*, *Freem. Ch.*
Rep. 41, 2 *Eq. Ca. Abr.* 212; *Bellasis*
v. Ermine, 1 *Ch. Ca.* 22.

(*f*) *Croagh v. Wilson*, 2 Vern. 572;
Gillet v. Wray, 1 P. W. 284.

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It is true that the foregoing limitations, which are detailed in Swinburne and Godolphin, are not found in our reports so expressly stated; but the cases did not call for such particularity, except those now alluded to before, which turned upon the looser doctrine of favourable interpretation, and that, which is not to be supported, of *Underwood v. Morris* (a), and which was determined by Mr. Justice Parker, sitting for the Lord Chancellor. It does not appear by any report that I have seen to have been closely considered; it is contrary to the canon and civil law, and apparently unreasonable, the restraint having been imposed only till twenty-one, and the marriage contracted improvidently at sixteen. I therefore agree with the late Lords Commissioners (b) in denying the authority.

Sir Dudley Rider, in arguing the case of *Hervey v. Aston*, expressly founds his argument on the perpetuation of the restraint; and Dr. Strahan, who argued on the same side, admits the qualification of time, place, and person, as given before.

The will before us contains a residuary bequest; but that has been repeatedly, and well enough determined, to leave the conditional legacy *in statu quo* (c); it only prevents that which has not been disposed of already, whatever be its amount, from falling by order of law to the executor or next-of-kin.

But the great vice of the argument in favour of the daughter lies here. It was not contended against the rules above mentioned, if the bequest had been to her at twenty-one or twenty-five, in case she was then unmarried, without more, that she could have claimed the legacy at any other time, or in any other case. But, because the mother was empowered to accelerate the gift by her consent to a proper marriage, and a proper settlement, it was thence argued, that it was indirectly putting an illegal constraint upon marriage. Now, if the first branch of the gift did not impose a direct restraint, in

(a) Atk. 184.

(b) See *Hemmings v. Munkley*, 1 Bro. Ch. 304; and see *Stackpole v. Beaumont*, 3 V. 89; *Knight v. Cameron*, 14 V. 389; *Clifford v. Beaumont*, 4 Russ. 325.

(c) *Semphill v. Bayly*, Pr. Ch. 562; *Paget v. Haywood*, cited 1 Atk. 378, overruling *Amos v. Horner*, 1 Eq. Ca.

Abr. 112, pl. 9, but where there is an express direction that the forfeited legacy shall fall into the residue, see *Wheeler v. Bingham*, 3 Atk. 364; *Lloyd v. Branton*, 3 Mer. 108, overruling dictum in *Reeves v. Herne*, 5 Vin. Abr. 343, pl. 41; and see *Ellis v. E.*, 1 Sch. & L. 1.

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contradiction of law, the relaxation of that condition certainly would not operate as an indirect restraint of the same nature.

I am therefore of opinion, that the daughter, having married at eighteen improvidently, so far as appears, and against the anxious prohibition of the mother, never came under the description to which the gift of the 10,000*l.* was attached.

It was therefore void, and a part of the residue; consequently, it belongs to the assignees of the mother, the defendants, and the bill must be dismissed, so far as it seeks to have that trust executed.

NOTES.

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8. As to conditions annexed to gifts for the purpose of effecting the separation of husband and wife, p. 576.

1. Generally.

Upon principles of public policy, conditions annexed to legacies, or contracts, operating unduly in restraint of marriage, as well as contracts entered into for the purpose of promoting marriage for reward, or in fraud of one of the parties to the marriage or their friends, are utterly null and void. This note deals with the subject of conditions in restraint of marriage. The refined distinctions as to the legality or illegality of these conditions, which have been made in the Ecclesiastical Courts and in Courts of Equity, apply only to *personal legacies and money* arising from the sale of lands directed to be sold by a valid testamentary trust (*a*). As to legacies out of real estate, they follow the rule that the common law prescribes and common sense supports, and conditions as to marriage annexed to them, not being otherwise illegal, are held binding. This distinction is said to have arisen from blind superstitious adherence of the ecclesiastical lawyers to the text of the civil law. "They never reasoned, but only looked into the books and transferred the rules as positive

(*a*) See Jarman, Wills (1893), p. 885; *Bellairs v. B.*, 18 Eq. 510, 516.

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rules to guide them, without weighing the different circumstances which existed between the Roman Empire and this country" (a). But the Courts of Equity have departed from the civil law in most important particulars, and have in fact made new rules applicable to legacies out of personal estate (b).

2. Testamentary Gifts.

By the common law, all conditions annexed to legacies *generally* prohibiting marriage (by which is meant a lawful marriage) (c), are void, as being "contrary to the common weal and good order of society:" per Lord *Thurlow* in the principal case, p. 548, *supra* (d).

So also conditions such as lead to a *probable* prohibition of marriage are void. Thus, where a legacy was given by a testator to his daughter, payable on her marriage or age of twenty-one, upon condition "that she shall not marry without consent, or shall not marry a man who shall not be seised of an estate in fee simple, or of freehold property of the clear yearly value of 500*l.*," the condition was held void, as being too general (e).

But all conditions which do not, directly or indirectly, import an absolute injunction to celibacy are valid. Thus, a condition to marry or not to marry any particular person (f); or a native of any particular country (g); or a person belonging to a particular class, as a domestic servant (gg); or to a particular religion, as a Papist (h); or a person not professing the Jewish religion, or not born a Jew, though converted to Judaism (i); or a condition which prescribes the ceremonies of marriage, as those of the Quakers (k); or which prohibits marriage before twenty-one, or other reasonable age (l), even before twenty-eight (m), is not illegal.

(a) Per L.C., *Stackpole v. Beaumont*, 3 V. 89, 3 R. R. 52.

(b) *Bellairs v. B.*, 18 Eq. p. 513, 515.

(c) *Re M'Loughlin*, 1 L. R. Ir. 421.

(d) *Keily v. Monck*, 3 Ridg. P. C. 205, 244, 247, 261; *Hervey v. Aston*, Com. Rep. 726, 729; S. C., 1 Atk. 361, 1 Eq. Ca. Abr. 110, pl. 2, n. a.; *Rishton v. Cobb*, 9 Si. 615, 619, 5 My. & C. 145; *Morley v. Rennoldson*, 2 Ha. 570; *Connelly v. C.*, 7 Moore, P. C. C. 438. As to real estate, see p. 558, *infra*, Pt. 4.

(e) *Keily v. Monck*, 3 Ridg. P. C. 205. And see *Long v. Dennis*, 4 Burr.

2052; *Ellis v. E.*, 1 Sch. & L. 1.

(f) *Jarvis v. Duke*, 1 Vern. 19; *Randal v. Payne*, 1 Bro. Ch. 55.

(g) *Perrin v. Lyon*, 9 East, 170, but see *W. v. B.*, 11 B. 621.

(gg) *Jenner v. Turner*, 16 C. D. 188.

(h) *Duggan v. Kolly*, 10 Ir. Eq. R. 295, 1 Eq. Ca. Abr. 110, pl. 2, n. a.

(i) *Hodgson v. Halford*, 11 Ch. D. 959.

(k) *Haughton v. H.*, 1 Moll. 611.

(l) *Stackpole v. Beaumont*, 3 V. 89, 3 R. R. 52, *infra*, p. 557.

(m) *Younge v. Furse*, 8 De G. M. & G. 756, *infra*, p. 557; and see p. 551, *supra*.

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A condition, however, not to marry a man of a particular profession or calling, whether there be a limitation over or not, is illegal (*a*). upon the ground, it is presumed, that it leads to a probable prohibition of marriage (*b*); but it has been held that a condition in a will, that a devisee should not marry some person, being or ever having been a domestic servant, is valid (*c*).

Conditions offering an inducement, to husband or wife, to live separate are illegal; thus conditions decreasing an annuity of a wife if she lives again with her husband, or increasing a legacy to a husband if he separates from his wife, are invalid (*d*).

A parent, however, may make a provision for his daughter cease on her taking the veil, or becoming permanently connected with a convent. The condition is *conditio rei licite*, and so the rules derived from conditions in restraint of marriage or otherwise against the liberty of the law, are inapplicable (*e*). And it is clear that, according to our law, a gift until marriage, and when the party marries then over, is good (*f*). But a woman cannot take under such a gift where her marriage has been declared void *ab initio* (*g*).

A question has arisen where a testator makes a bequest to one whom he supposes a widow, under which she is to receive an annuity so long as she continues unmarried, whether she is entitled to a perpetual annuity, though at the date of the will she is married to a second husband. It was decided by Cottenham, L.C., in *Rishton v. Cobb* (*h*), that she was so entitled. But in *Re Boddington*, supra, Selborne, C., said he should have great difficulty in following that decision.

Conditions restraining marriage under the age of twenty-one or other reasonable age, unless with the consent of parents, guardians, or executors, are valid (*i*).

(*a*) 1 Eq. Ca. Abr. 110, pl. 2, n. a.

(*b*) *Koily v. Monck*, 3 Ridg. P. C. 205, 265.

(*c*) *Jenner v. Turner*, 16 C. D. 188.

(*d*) *Bean v. Griffith*, 1 Jur. (N. S.) 1045; *Cartwright v. C.*, 3 De G. M. & G. 982.

(*e*) *Dickison's Trusts*, 1 Sl. (N. S.) 37, 46; and see *Clavering v. Ellison*, 8 De G. M. & G. 662; 7 H. L. Cas. 707; *Re Catt's Trusts*, 2 Hem. & M. 52.

(*f*) *Morley v. Rennoldson*, p. 559, infra; *Barton v. B.*, 2 Vern. 308; *Jordan v. Holkam*, Amb. 209; *Lloyd v.*

L., 2 Sl. (N. S.) 255, 263; *Newton v. N.*, 2 J. & H. 356.

(*g*) *Re Boddington*, 22 C. D. 597, 25 C. D. 685.

(*h*) 5 My. & C. 145, affirming the decision of *Shadwell*, V.-C., 9 Sl. 615.

(*i*) *Sutton v. Jewke*, 2 Ch. R. 9; *Creagh v. Wilson*, 2 Vern. 573; *Ashton v. A.*, Pr. Ch. 226; *Chauncey v. Graydon*, 2 Atk. 616; *Stackpole v. Beaumont*, p. 557, infra; *Clifford v. Beaumont*, 4 Russ. Ch. Ca. 325, overruling *Hemmings v. Munkley*, 1 Bro. Ch. 304; *Dashwood v. Bulkeley*, 10

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But although such restraint may be valid, the efficiency of the condition imposed will depend, in a great measure, upon the nature of the property, and of the condition itself; for, as is laid down in the principal case, in construing conditions in restraint of marriage, annexed to a devise of *lands*, charges upon it, powers to be exercised over it, money legacies referring to such charges, and money to be laid out in land, a Court of Equity will follow the rule of the *common law*. If they are annexed to a mere *personal legacy*, it will follow the rules of the Ecclesiastical Court, derived from the civil law, except so far as they have been modified or departed from by its own decisions, although no substantial reason exists for such distinction (*a*).

There is a marked distinction, however, between conditions *precedent* and conditions *subsequent*; for where a condition is precedent, as the estate cannot commence until the condition is performed, the condition is beneficial, as creating an estate, and ought to be construed favourably. Where, however, a condition is subsequent, as it operates by way of destruction of an estate already in existence, and is of a penal nature, it ought to be construed strictly.

3. Conditions Precedent.

With regard to a devise of land (*b*), or of a portion to be raised out of land, or a legacy having reference, and given as an augmentation, to a portion to be raised from land (*c*), on condition of *marrying with consent*, it is clear that it will not take effect unless the condition be complied with, even although there be no gift over; for such condition is valid at common law (*cc*).

With respect to personalty, however, the cases are very difficult to reconcile (*d*); but there are certainly many cases which have been decided after great deliberation which show that where a personal legacy is bequeathed to a person upon marriage under twenty-one, or other reasonable period, *with the consent* of persons designated by the testator, the legacy will not vest unless the consent be first obtained; for the condition is precedent; and, as it imposes no other

V. 230; and see *Clarke v. Parker*, 19 V. 1, 12 R. R. 124; *Beaumont v. Squire*, 17 Q. B. 933.

(*a*) *Supra*, p. 549; *Stackpole v. Beaumont*, 3 V. 89, 3 R. R. 52; *Pearce v. Loman*, 3 V. 139; *Bellairs v. B.*, 18 Eq. 510.

(*b*) See p. 558, *infra*, line 16; *Fry v.*

Porter, 1 Ch. Ca. 138; *Bertie v. Falkland*, 3 Ch. Ca. 129.

(*c*) *Reves v. Horno*, 5 Vin. Abr. 343, pl. 41; *Hervey v. Aston*, 1 Atk. 361; *Reynish v. Martin*, 3 Atk. 330.

(*cc*) *Supra*, p. 549; *infra*, p. 558, Pt. 4.

(*d*) See *Jarman* (1893), p. 888.

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restraint upon the liberty of marriage than is imposed or allowed by the law and policy of the land, it is good, *whether there be a limitation over or not* (a).

In *Stackpole v. Beaumont* (b), the testator devised his real estates in remainder to the use of L. W., or such person, if any, with whom she should first intermarry, "if before twenty-one, then with the consent of his trustees, or the survivor of them," for then joint lives, and the life of the survivor, &c. Towards the end of his will, he gave to L. W. 10,000*l.*, "payable and to be paid to her as follows:—5,000*l.* upon her marriage with such consent as aforesaid, and 5,000*l.* within two years next afterwards." L. W., while an infant, and a ward of the Court, eloped, and was married in Scotland, without the consent of the trustees. Lord *Rosslyn* held, that she was not entitled to the legacy. "Confined to cases," said his Lordship, "where the restraint operates only up to the age, till which, by the law and policy of the country, consent is necessary, I have no difficulty to say there is no authority to lead the Court to pronounce a proposition so repugnant to that law, as that such a condition is invalid. In *Scott v. Tyler* (c), there is a very accurate, though not a very extended, opinion of Lord *Thurlow* (reported by Brown), which carries conviction along with it. The question is, not whether any forfeiture has been incurred, but whether the parties to whom the legacy is given have put themselves in a situation to answer that description of the person to take. There is no gift here but in the direction to pay for I cannot stop in the middle of a sentence. He gives her 10,000*l.* that is, in effect, two sums of 5,000*l.*, one payable upon her marriage with consent. She has not married with consent. She has married without it. Can she claim the 5,000*l.* under the will? I do not see the great importance of the distinction upon a bequest over of the legacy. It is one of the points that occurred to Judges sitting here to deliver them from the difficulty arising from the rule of the civil law adopted without seeing the ground and the reason of applying it to this country under different circumstances" (d).

So in *Younge v. Furse* (e), the Lords Justices, reversing *Rumilly*, M.R., held that where a legacy or annuity is given by a parent to his daughter provided she does not marry before a certain age, as for

(a) *Hemmings v. Munkley*, 1 Bro. Ch. 304, 1 Cox, 38; overruling *Underwood v. Morris*, 2 Atk. 184; *Scott v. Tyler*, *supra*; *Re Brownswill*, 18 C. D. 61.

(b) 3 V. 89, 3 R. R. 52.

(c) 2 Bro. Ch. 431.

(d) And see *Clifford v. Beaumont*, 4 Russ. 325; *Knight v. Cameron*, 14 V. 389; but see *Reynish v. Martin*, 3 Atk. 330; 1 Wils. 130.

(e) 8 De G. M. & G. 756.

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instance the age of twenty-eight, she will not be entitled to the legacy or annuity if she marry before that age, even with the consent of her parent.

So where there is another legacy or provision for the legatee in the event of marriage without consent (*a*). In both these instances the testator may be considered to have shown it to be his intention by a gift over to another, in the first, and by a different gift to the legatee in the second case, that the condition should not be taken merely as *in terrorem*.

There is some doubt, with regard to a personal legacy, whether a condition precedent requiring *consent generally*, without reference to the age of the legatee, is valid, unless it be accompanied by a bequest over on marriage without consent, in which case it is clearly valid (*b*). But conditions in *general* restraint of marriage, though accompanied by a gift over, are invalid (*c*).

4. Conditions Subsequent.

As to *devises of real estate*, some cases suggest that when the object of the will is in *general* restraint of marriage, and for the promotion of celibacy, the Courts will hold such a condition to be contrary to public policy and void (*d*). The editors have not been able to find any decision in which such a condition annexed to a devise of real estate has been held void, except, perhaps, the case of *Loyd v. L.* (*e*).

A condition subsequent in restraint of marriage is void in the case of a tenancy in tail, because it is repugnant to that estate (*f*).

But in many other cases such conditions, in a devise of land, have been treated as valid at common law (*g*), as when annexed to a portion charged on land (*h*), powers to be exercised over it (*i*), money legacies referring to such charges (*k*), money to be laid out in

(*a*) *Creagh v. Wilson*, 2 Vern. 572; *Gillot v. Wray*, 1 P. W. 284; cf. *Holmes v. Lysaght*, 2 Bro. P. C. 261; *Reynish v. Martin*, 3 Atk. 330.

(*b*) *Malcolm v. O'Callaghan*, 2 Madd. 349; *Gardiner v. Slater*, 25 B. 509.

(*c*) *Jarman* (1893), 885, citing *Morley v. Rennoldson*, 2 Ha. 570; *Lloyd v. L.*, 2 Si. (N. S.) 255; *Bellairs v. B.*, 18 Eq. 510.

(*d*) See *Perrin v. Lyon*, 9 East, 170; *Jones v. J.*, 1 Q. B. D. p. 282; *Jarman* (1893), pp. 885, 892.

(*e*) 2 Si. (N. S.) 255. There was a

gift of a mixed fund and also of a copyhold, subject to a condition determining the gift in case of marriage and a gift over. The condition was held void both as to the mixed fund and also as to the copyhold. See also 18 Eq. p. 517.

(*f*) *Earl of Arundel's case*, Jenk. 6 Cent. Ca. 26, p. 243; 3 Dyer, 342, b.

(*g*) *Ib.*

(*h*) *Pawlett v. P.*, 1 Vern. 204, 321; *Harvey v. Aston*, 1 Atk. 361.

(*i*) Per Lord *Thurlow*, ante, p. 549.

(*k*) *Ib.*

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land (*a*); and it has been stated by *Jessel*, M.R., that in such cases a charge on land follows the rule of common law, as it is called, as distinguished from the rule of equity (*b*). And it has been held that if land were charged in favour of A., with a subsequent condition in *general* restraint of marriage, such condition would be valid (*c*).

A recent case shows that a devise to a person, either by a limitation over or condition made to cease on marriage, will not, if the Court can make out the object to be not to restrain marriage but to make a provision for the devisee during celibacy, be held to be invalid. Thus, in *Jones v. J.* (*d*), lands were devised by the testator to his sister M., her daughter E., and S., the daughter of D. Jones, "jointly during their lifetime": "if any or some of the before-mentioned parties named depart this life, his or her share or shares go to my sister J., wife of J. D., together with her daughter M., during their lifetime." "Provided the said M., daughter of the said J., my sister, shall remain in her present state of single woman, otherwise if she shall alter her present state of single woman, and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed and enjoyed by the other mentioned parties share and share alike." Mary, the daughter of Jemima, having succeeded to a share of the land, married one Evans. It was held that the estate of Mary Evans in the land ceased on her marriage, for that the object of the testator appeared to be, not to restrain marriage, but to provide for Mary Evans while she was unmarried, and that the question whether the clause amounted to a limitation or condition was immaterial, as the authorities upon such a distinction did not apply to a devise of realty (*d*).

In the case of *personalty*, if a *legacy* is given subject to a condition in restraint of marriage which is *general*, and also *subsequent*, then the condition is altogether void, and the legatee retains the interest given to him, discharged of the condition, even although there be a limitation over. Thus in *Morley v. Renoldson* (*e*), the testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support until she attained twenty-one or married with the consent of his trustees under that age; and upon her attaining such age or her marriage, for her separate use, with remainder to her children; and in case of her death without issue,

(a) Per Lord *Thurlow*, ante, p. 549.

(b) *Bellairs v. B.*, 18 Eq. p. 513, and p. 549, *supra*.

(c) *Reynish v. Martin*, 3 Atk. 330.

(d) 1 Q. B. D. 279. See *Webb v. Grace*, p. 563, *infra*; *Potter v.*

Richards, 21 L. J. Ch. 488.

(d) Consider lines 16-25 of the judgment, 1 Q. B. D. p. 282.

(e) 2 Ha. 570. This case was heard. (1895) 1 Ch. 449, C. A., on a point left open by the V.-C.

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he bequeathed the same to certain legatees in remainder. The testator afterwards, by a codicil, declared that, in consequence of a nervous debility, his daughter was unfit for the control of herself, and his will was, *that she should not marry; and in case of her marriage or death*, he gave the property he had bequeathed to her over to the same legatees in remainder. It was held by Sir James Wigram, V.-C., that the restraint upon marriage being general, the condition was void, notwithstanding the limitation over. "I cannot do otherwise than hold," said his Honour, "that this is a conditional gift in *general restraint of marriage*, by which the testator seeks to cut down an interest which he had given by will; and, therefore, that I must hold this to be a void condition."

The result is the same where the property given subject to a condition in general restraint of marriage, is a mixed fund arising from the proceeds of realty and personalty (*a*), or is income arising from such a mixed fund, and *semble*, if it be a legacy out of the proceeds of realty directed to be converted (*b*). Or where the property consists of real and personal estate, given together (*c*).

Where the condition in restraint of marriage is *not general*, but against marriage with a particular person (*d*), or restraining a widow of a testator from marrying again (*e*), in the absence of a gift over upon breach of the condition, it has been construed as *in terrorem* merely (*ee*).

Where, however, there is a *gift over* on such a marriage, and even, it seems, where the gift to a *widow* is made to cease upon marriage a condition subsequent against marriage, attached to a devise or bequest, is valid, not only when the legatee or devisee is the widow of the testator (*f*), but also when she is the widow of another person (*g*) and a gift over on the second marriage of a *man* will be valid (*h*).

Where a legacy is given to a woman absolutely, at a certain time and there is a subsequent condition requiring *consent* to marriage the condition will be construed as *in terrorem*, if there be no bequest over, although there be a *diminished gift* to the legatee in the

(*a*) Lloyd v. L., 2 Si. (N. S.) 255.

(*b*) Bellairs v. B., 18 Eq. 514, per Jessel, M.R.; *Re Hart's Trusts*, 3 De G. & J. 195 (proceeds of conversion of land).

(*c*) Duddy v. Gresham, 2 L.R. Ir. 442.

(*d*) W. v. B., 11 B. 621; and see Poole v. Bott, 11 Ha. 33.

(*e*) Marples v. Bunbridge, 1 Madd. 590; Barton v. B., 2 Vern. 308.

(*ee*) Cf. Lloyd v. Branton, 3 Mer. 168, *infra*, p. 561.

(*f*) Tricker v. Kingsbury, 7 W. R. 652; Craven v. Brady, 4 Ch. 296; Dickson's Trusts, 1 Si. (N. S.) 37.

(*g*) Charlton v. Coombes, 11 W. R. 1038; Newton v. Marsden, 2 J. & H. 356; Tricker v. Kingsbury, 7 W. R. 652; cf. *Re Tredwell*, (1891) 2 Ch. 640.

(*h*) Allen v. Jackson, 1 C. D. 359.

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alternative of her marrying without consent (*a*). And if the power of diminishing the legacy is delegated to another person, the condition will be considered as *in terrorem* merely, in the same manner as if the diminution of the legacy had been provided by the testator in his will (*b*).

Should, however, the legacy be limited over to another person on the marriage without consent, the condition will not be considered merely as *in terrorem*, but on breach of it, the gift over will take effect (*c*).

Different reasons have been assigned by different judges for the operation of a bequest over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said, that it was the interest of the devisee over which made the difference; and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect. Whatever might be the ground of decision, it was held, that where the testator only declared that, in case of marriage without consent the legatee should forfeit what had been before given, but did not say what should become of the legacy, such declaration would remain wholly inoperative (*d*).

It seems that the mere gift of a residue, as is laid down by Lord *Thurlow*, in the principal case, will not be considered as a bequest over, for it has been repeatedly determined that that will leave the legacy *in statu quo*, as it only prevents that which has not been disposed of already, whatever be its amount, from falling, by order of law, to the executor or next of kin (*e*). But there is a clear distinction between a mere residuary bequest, and a direction that a legacy should sink into and form part of the residue; for that is tantamount to a gift over to the persons participating in the residue (*f*).

(*a*) *Garret v. Pritty*, 2 Vern. 293, 3 Mer. 120, n.

(*b*) *Wheeler v. Bingham*, 3 Atk. 367.

(*c*) *Stratton v. Grymes*, 2 Vern. 357; *Barton v. B.*, 2 Vern. 308.

(*d*) *Per Grant*, M.R. in *Lloyd v. Branton*, 3 Mer. 117.

(*e*) *Paget v. Haywood*, cited 1 Atk.

378; *Keily v. Monck*, 3 Ridg. P. C. 235, 252; overruling *Amos v. Horner*, 1 Eq. Ca. Abr. 112, pl. 9; see *Belairs v. B.*, 18 Eq. 510.

(*f*) *Wheeler v. Bingham*, 3 Atk. 368; *Lloyd v. Branton*, 3 Mer. 108, 118; *Stevenson v. Abington*, 11 W. R. 935.

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5. Limitations until Marriage as Distinguished from Conditions.

Although in some respects a condition and a limitation may have the same effect, yet in English law there is a great distinction between them (*a*). The Court should first determine whether the particular gift by way of limitation is the subject of a condition, and then apply the law (*b*). The distinction does not apply to real estate (*c*).

Where property is limited to a person until marriage, and upon marriage then over, the limitation is good. "It is difficult," says *Wigram, V.C.*, "to understand how this could be otherwise: for in such a case there is nothing to give an interest beyond the marriage. If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition and leave the original gift in operation; but if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage" (*d*).

In *Heath v. Lewis* (*e*), a testator bequeathed an annuity to a single lady (if living and unmarried at the death of a prior annuitant) "during the term of her natural life, if she shall so long remain unmarried:" it was held by the Lords Justices to be a limitation as distinguished from a condition, and that the annuity ceased when the lady married. No gift over is required in the case of a limitation as distinguished from a condition.

In *Re Moore* (*f*), a testator directed his trustee to pay to his sister "M.," "during such time as she may live apart from her husband, before my son attains twenty-one years, the sum of 2*l.* 10*s.* per week for her maintenance whilst so living apart from her husband" M. and her husband were married some years before the date of the will and never lived apart until some time after the death of the testator. The testator's son was living and an infant. Held on a full consideration of the cases that this was a limitation of weekly payments during a specified time, and not a legacy subject to a condition precedent or subsequent, and that the object of the limitation being to induce M. to live apart from her husband it was void (*g*).

(*a*) Per *Cotton, L.J.* in *Re Moore*, 39 C. D. p. 129.

(*b*) Per *Kay, J.*, *Re Moore*, 39 C. D. p. 119.

(*c*) See *Jones v. J.*, p. 559, *supra*.

(*d*) *Morley v. Rennoldson*, 2 Ha. 580. See also *Jordan v. Holkham*, Amb. 209; *Barton v. B.*, 2 Vern. 308; *Low v. Peers*, C. J. *Wilmot's Cases*,

369; *Bird v. Hunsdon*, 2 Swans. 342; *Marples v. Bainbridge*, 1 Madd. 590;

Evans v. Rosser, 2 Hem. & M. 190.

(*e*) 3 De G. M. & G. 954.

(*f*) 39 C. D. 116.

(*g*) And see *Webb v. Grace*, 3 Ph. 701, *infra*, p. 563; *Heath v. Lewis*, 3 De G. M. & G. 954; *Evans v. Rosser*, 2 Hem. & M. 190; *Rochford v. Hackman*,

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A limitation over is valid not only in the case of the marriage of a widow (*a*), but also in the case of a widower (*b*).

A gift to an unmarried person cannot be construed to mean a gift to that person so long as he shall remain unmarried. If, therefore, a testator makes a bequest to his *unmarried children* and a child became entitled to participate in the bequest by filing the character of an unmarried child, such child will not lose that right by a subsequent marriage (*c*).

And where there is a contract to pay a certain sum until marriage, with a proviso that a smaller sum is to be paid afterwards, the limitation will hold good. Thus in *Webb v. Grace* (*d*), A. covenanted to pay to E. C. during her life, subject to the proviso thereafter contained, an annuity of 40*l.*, the proviso being that in case E. C. should at any time thereafter happen to marry, the annuity should thenceforth be reduced to 20*l.* only, which sum should, in such case, be paid and payable to E. C. from the time of her marriage for the remainder of her life. E. C. having married, Lord *Cottenham*, reversing the decision of *Shadwell*, V.-C. (*e*), held her only to be entitled to the annuity of 20*l.* "The question," said his Lordship, "turns upon the construction of the covenant; for there really cannot be any doubt as to the rule of law. The questions which have arisen as to conditions subsequent in restraint of marrying do not appear to me to apply. There can be no doubt that marriage may be made the ground of a limitation ceasing or commencing. It is unnecessary to refer to authorities for this purpose; *Richards v. Baker* (*f*), *Sheffield v. Orrery* (*g*), *Gordon v. Adolphus* (*h*), were cited in the argument. If, then, this grant is a grant of 40*l.* per annum until marriage, and, from that event happening, of 20*l.* per annum for life, there can be no doubt but that such a gift is lawful, and that, after marriage, there can be no demand for the 40*l.* per annum. The claim is grounded upon contract and obligation on the part of the grantor; the parties claiming must therefore prove that their claim is within the terms of the contract and obligation. . . . Is there, in

9 Ha. 475; *Brown v. Peck*, 1 Eden, 140; *Wren v. Bradley*, 2 De G. & Sm. 49; which were considered in *Re Moore*; and see *Potter v. Richards*, 24 L. J. Ch. 488, and cf. *Corbett v. C.*, 14 P. & D. 9.

(*a*) *Jordan v. Holkham*, Amb. 209.

(*b*) *Allen v. Jackson*, 1 C. D. 399.

(*c*) *Jubber v. J.*, 9 Si. 503. See also

Hall v. Robertson, 4 De G. M. & G. 781.

(*d*) 2 Ph. 701. See *Jones v. J.*, p. 559, *supra*.

(*e*) 15 Si. 384.

(*f*) 2 Atk. 321.

(*g*) 3 Atk. 282.

(*h*) 3 Bro. P. C. 306, Toml. edit.

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the covenant, any contract or obligation to pay 40*l.* per annum after the marriage of E. C.? The argument in favour of the claim assumes that there is an unqualified grant of an annuity of 40*l.* per annum for life, and an attempt to defeat the gift by an illegal condition subsequent. This proposition, I think, fails in all its parts: for there is not any unqualified gift of an annuity of 40*l.* for life; the contract and obligation is, to pay to E. C. during her life, subject to the proviso hereinafter contained, an annuity of 40*l.* at certain times specified. The contract and obligation is not absolute and unqualified, but explained, qualified, and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is, therefore, to pay 40*l.* per annum to her during so much of her life as she shall remain unmarried, which brings the case within the unquestioned rule of law, as acted upon in the cases referred to. One of them, indeed,—*Sheffield v. Orrery*—is, upon this point, stronger than the present; for there was a gift for life, without any qualification in the terms of the grant, but a subsequent condition, giving the property over in the event of marriage; and Lord *Hardwick* said, that the gift over was to take effect on the marriage. There is another way in which this may be viewed equally fatal to the claim. The contract and obligation is, to pay a certain sum at certain stipulated periods during the life of E. C.; but she is, by the proviso, at each of those periods to be qualified to receive it by the fact of not being married. Can she claim any of such payments, though disqualified by the fact of marriage? The condition, therefore, if there be one, is precedent and not subsequent" (a).

A limitation over on marriage, if the marriage be with the testator himself, will not take effect, at all events, if the will be republished after the marriage, as the limitation would then, it seems, have reference to a subsequent marriage. Thus in *Cooper v. C.* (b), a testator by his will, dated in 1841, devised lands to trustees upon trust for B. for life, "provided she does not marry, and from and after her decease or second marriage," for other persons. In 1847 the testator married B., and afterwards made a codicil to his will which had the effect of republishing it. It was held by Lord Chancellor *Brady*, that the devise to B. took effect notwithstanding her marriage to the testator (c).

(a) Cf. *Re Moore*, supra, p. 562.

(b) 6 Ir. Ch. R. 217.

(c) See also *Re Corkers, Minors*, 1

Ir. Jur. 316; *West v. Kerr*, 6 Ir. Jur. 141; *McCulloch v. M'C.*, 3 Gif. 606.

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Where the object of a deviser appears to be, not to restrain marriage, but to provide for a single woman while she is unmarried, a gift over upon her marriage will take effect, and the question as to whether the clause containing such gift amounts to a condition or a limitation is immaterial, inasmuch as such a distinction does not apply to a devise of realty (*a*).

A condition that trustees shall not pay over the shares of legatees without taking from them bonds that they will not intermarry or illegally cohabit with certain persons, will not be enforced (*b*).

6. As to Consent to Marriage.

In the case of a *condition subsequent* a marriage in the lifetime of the father, with his consent, or even his subsequent approbation (*c*), is equivalent to a marriage after his death with the consent of trustees (*d*).

A condition in a will requiring the consent of trustees to marriage has been held not to be applicable to the second marriage of a daughter who had married between the date of the will and the death of the testator, and was a widow at his death (*e*).

A condition forfeiting a legacy in the event of the legatee marrying a certain person without the testator's written consent, has been limited to a marriage in the testator's lifetime (*f*).

Courts of equity will consider whether a substantial consent may not be inferred from the acts of the persons whose consent is required although no formal consent has been given. Thus where no particular mode is prescribed for trustees to give their consent it may be presumed that they have given it where they have allowed courtship and marriage to take place without expressing their dissent (*g*), especially if from any fraudulent or corrupt motive they have withheld actual consent (*h*). And so where a long period has elapsed after the forfeiture and no objection has been taken, assent may be presumed (*i*). And in *Strange v. Smith* (*k*), although the written

(*a*) *Jones v. J.*, 1 Q. B. D. 279, and compare with the judgment of the M.B. in *Bellairs v. B.*, 18 Eq. 510, at p. 517.

(*b*) *Poole v. Bott*, 11 Ha. 33.

(*c*) *Wheeler v. Warner*, 1 S. & S. 304, followed in *Tweeddale v. T.*, 7 C. D. 633.

(*d*) See *Clarke v. Berkeley*, 2 Vern. 720; *Coffin v. Cooper*, cited 1 V. & B. 481; *Parnell v. Lyon*, 1 V. & B. 479; *Coventry v. Higgins*, 14 Si. 30; *Vio-*

lett v. Brookman, 5 W. R. 342.

(*e*) *Crommelin v. C.*, 3 V. 227; *Hutcheson v. Hammond*, 3 Bro. Ch. 128.

(*f*) *Booth v. Meyer*, 38 L. T. (N. S.) 125.

(*g*) *Campbell v. Lord Netterville*, cited 2 V. 530, 10 V. 213; *D'Aquilar v. Drinkwater*, 2 V. & B. 225.

(*h*) *Mesgrett v. M.*, 2 Vern. 580.

(*i*) *Jarman* (1893), p. 591, citing *Re Birch*, 17 B. 358.

(*k*) *Amb.* 263.

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consent of the mother was made requisite, Lord *Hurdwicke* held that the mother having made her first offer to the intended husband received him at her house, encouraged his addresses to her daughter, and treated with him and his father about the settlement, had thereby given her consent (although it does not appear by the report, that it was in writing); and that she could not withdraw it. *Eldon*, C., cites this case in *Clarke v. Parker* (a), but does not notice that the consent was required to be in writing. In *Worthington v. Evans* (b), a letter was written by the trustee the day before the wedding, and was held to be a sufficient consent in writing, and *Lord*, V.-C., said: "If there had not been such a letter, inasmuch as the formal consent in writing would have been executed by him, but for the accidental delay occasioned by the other trustee, and not from any change of purpose, the Court would have considered his consent to have been substantially given, according to the will; because he had expressed his full approbation of the marriage, and only did not sign it for a reason personal to himself" (c).

In *Tollock v. Croft* (d), there was a bequest of personal estate to A., provided she married with the consent of B., but if she married without such consent, then to C. *Grant*, M.R., held, that a general permission given by B. after A. attained twenty-one, to contract marriage as she might think fit, and subsequent approbation of a marriage contracted under such general permission without his knowledge, was a sufficient compliance with the requisition.

The Court will interfere where the refusal of consent by a trustee proceeds from any vicious, corrupt, or unreasonable cause (e). But even if the person who refuses his consent be the devisee over, he is not obliged to show his reason for dissent—it lies upon the party requiring assent to show that it has been unreasonably refused: "for the testator must know that he has made necessary the consent of a person who has an interest" (f).

And if a trustee, where consent to a marriage is required, refuse to

(a) 19 V. 12, 12 R. R. 124.

(b) 1 S. & S. 165.

(c) And see *Daley v. Desbouverie*, 2 Atk. 273, followed in *Clarke v. Parker*, 19 V. 1, 24, and in *Re Smith*, 44 C. D. p. 639; *D'Aquilar v. Drinkwater*, 2 V. & B. 225.

(d) 1 Mer. 181. See also *Mercer v. Hall*, 4 Bro. Ch. 228.

(e) *Dashwood v. Bulkeley*, 10 V. 245, 12 R. R. p. 128 (n.); *Clarke v. Parker*, 19 V. 18; *Peyton v. Bury*, 2 P. W. 628.

(f) *Clarke v. Parker*, 19 V. 22, 12 R. R. 124. See, however, the remarks of Lord *Hurdwicke* in *Harvey v. Aston*, 1 Atk. 381; and of Lord *Mansfield* in *Long v. Dennis*, 4 Burr. 2052.

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interfere, either by consenting or objecting to a proposed match, the Court will direct a reference to inquire and state to the Court whether the marriage is a proper one (a).

If consent be once obtained, unless by fraud or misrepresentation (b), it cannot without a sufficient reason be withdrawn especially if the person so withdrawing his consent would derive a benefit from a marriage without consent (c).

A conditional consent may be withdrawn upon non-performance of the conditions (d).

When the consent of *all* the trustees is required, the consent of two, without the third being consulted, is insufficient, as there is a discretion in him as well as the others (e); but the consent of one of the executors or trustees who renounced or never acted, would according to the more recent authorities be unnecessary, the authority of consent being annexed to the office (f).

Where the condition has become impossible by all the persons dying whose consent was necessary before marriage, it is discharged (g).

But if some only of such persons survive, the consent of such survivors, although only a performance of the condition *ex-parte* will be sufficient. Thus where a legacy is given to a legatee on marriage upon a *condition precedent* requiring the consent of both parents of the legatee, the consent of the surviving parent will be deemed a sufficient compliance with the condition (h). *A fortiori* will this doctrine be applicable in the case of *conditions subsequent*. Thus where a legacy was bequeathed to a lady upon condition of her marrying with the consent of *two* persons who were also executors, on the death of one of them, the condition being subsequent and

(a) Goldsmid v. G., G. Coop. 223.

(b) Dillon v. Harris, 4 Bligh, 321.

(c) Strange v. Smith, Amb. 263; Merry v. Ryves, 1 Edon, 1; Le Jeune v. Budd, 6 Si. 441.

(d) Dashwood v. Bulkeley, 10 V. 230; D'Aquilar v. Drinkwater, 2 V. & B. 225.

(e) Clarke v. Parker, 19 V. 1, 12 R. R. 124.

(f) See Clarke v. Parker, *supra*; Worthington v. Evans, 1 S. & S. 165; Boyce v. Corbally, Id. & G., 102, in which case, Graydon v. Hicks, 2 Atk.

16, contra, was cited; Ewens v. Addison, 4 Jur. (N. S.) 1034; White v. McDermott, 7 Ir. R. C. L. 4; cf. Crawford v. Forshaw, (1891) 2 Ch. 261.

(g) Per Lord Hardwicke in Graydon v. Hicks, 2 Atk. 16; Jones v. Suffolk, 1 Bro. Ch. 528; Aislalie v. Rice, 3 Madd. 256; Grant v. Dyer, 2 Dow. 93.

(h) Dawson v. Oliver-Massey, 2 C. D. 753. See also Green v. G., 2 Jo. & Lat. 529; Ewing v. Addison, 7 W. T. 21.

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become impossible, she might marry without the consent of the survivor (a).

Where, however, the consent of a class of persons as guardians is required, whose temporary non-existence could be easily replaced by an application to the Court, a marriage during the non-existence of guardians and consequently without consent, will prevent the vesting of a legacy given upon their consent (b).

And the consent of a guardian appointed by the infant herself would not have been sufficient (c).

The same result was arrived at in the case of the marriage settlement of the father in which sums of money were held in trust for daughters who attained twenty-one or married with the consent of their parents or guardians (d).

The subsequent approbation of persons whose consent is necessary to a marriage, is not generally sufficient, because it cannot amount to a performance of a condition, or dispense with a breach of it (e).

In *Bardston v. Humphrey* (f), the marriage was to be with "the consent or approbation" of a trustee, who did not give his approbation until a month after the marriage: *Hardwicke*, C., distinguished between consent and approbation, and inclined to the opinion that the subsequent approbation would do. See, however the remarks of *Eldon*, C., in *Clarke v. Parker* (g).

In *Long v. Ricketts* (h), the condition was that the party should not marry *against* the consent of the trustees: a marriage contracted *without* their knowledge, but with their subsequent approbation, was held a breach of the condition.

Where a legacy is to vest or be paid at a particular age, and then there is a clause of forfeiture on marriage without consent, such clause will be construed as having relation to a marriage under the specified age: and a marriage subsequent thereto without consent is no forfeiture (i). So if a bequest be made in trust for A. his heirs and executors *when and as soon as he attained twenty-one, or married before that age with consent of guardians*, but if he should

(a) *Peyton v. Bury*, 2 P. W. 626; *Fry v. Porter*, 1 Ch. Cas. 138; 1 Mod. 300. but see *Jones v. Earl of Suffolk*, 1 Bro.

Ch. 529; *Collett v. C.*, 35 B. 312.

(f) *Amb.* 286.

(b) *Re Brown's Will, &c.*, 13 C. D. 61.

(g) 19 V. 21, 12 R. R. 124.

(h) 2 S. & S. 179.

(c) *Ib.*

(i) *Lloyd v. Branton*, 3 Mer. 116;

(d) *Re Brown's Will, &c.*, 18 C. D. 61.

Osborn v. Brown, 5 V. 527; *Knapp v. Noyes*, *Ambl.* 662; *Duggan v. Kelly*.

(e) *Reynish v. Martin*, 3 Atk. 330;

10 Ir. Eq. Rep. 473.

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not attain twenty-one or marry without such consent, then over, *Grant*, M.R., held that on attaining twenty-one, A. was absolutely entitled, although he had *previously* married without consent (a).

Where, however, there was a bequest to A. to be *paid at twenty-one or marriage*, but if A. died under twenty-one or married without consent of B. then over. On marriage of A. under twenty-one without consent, it was held by *Hardwicke*, C., that a forfeiture had taken place (b). In the former class of cases it will be observed that the legacy given on a condition *precedent* vests, if either of the two contingencies happen. On the other hand, in the latter class the legacy given on a condition *subsequent* determines if either of these happens.

The Court may relieve against forfeiture occasioned by the negligence of a trustee. Thus, in *O'Callaghan v. Cooper* (c), a trust term was limited to trustees, to raise out of real estate portions for daughters, to be paid on marriage, upon condition that they should be married with consent of their mother, or, after her death, of the trustees, and that the husband should previously make a settlement. A marriage having taken place with the consent of the mother and the privity of the trustee, but by the neglect of the trustee, without any settlement, the Court, on a settlement being made, relieved against the forfeiture.

A testator's consent to a marriage to take place *after his death*, does not dispense with a condition of forfeiture annexed to a bequest in his will that the legatee shall forfeit the same in case he marry without the consent of persons named in the will (d). And where a bequest is until marriage, the consent of the testator to a marriage will not extend the bequest (e).

But where the testator has not made the consent of *other* persons requisite, the question may arise, when he has imposed any condition with respect either to the time of marriage, or against marriage with a particular person, how far by *his own consent* to the marriage he will be held to have dispensed with the condition, and it seems that where the condition is *subsequent*, the consent of the person who imposed the condition will remove the consequence of its non-perfor-

(a) *Austen v. Halsey*, 13 V. 125; *Knight v. Cameron*, 14 V. 389; cf. *Peyton v. Bury*, 2 P. W. 626; *Dawson v. Oliver-Massey*, 2 C. D. 753, 760.

(b) *Chauncy v. Graydon*, 2 Atk. 616.

(c) 5 V. 117.

(d) *Lowry v. Patterson*, 8 Ir. R. Eq. 372.

(e) *Bullock v. Bennett*, 7 De G. M. & G. 283; *West v. Kerr*, 6 Ir. Jur. 141; *Cooper v. C.*, 6 Ir. Ch. R. 217.

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mance. Thus, in *Smith v. Cowdery* (a), a testator bequeathed his residuary personal estate unto his executors upon trust to pay and divide the same equally among his children Susannah, Mary Ann, Fanny, and William, when they should respectively attain twenty-one, or on the day of marriage, the interest in the meantime to be applied for their maintenance, "except his daughter Mary, whose share the testator directed should be paid to her upon the day of her intermarriage with any other person *excepting H. T.*, and the interest in the meantime to be applied for her maintenance;" and the testator directed that "in case his daughter Mary should at any time thereafter intermarry with H. T., then upon trust to pay and divide her share of the residue of his personal estate" unto and amongst his other children. The testator died on the 1st of June, 1795, but his daughter had during the testator's lifetime, and with his consent, married H. T. *Leach*, V.-C., held that Mary was entitled to her legacy. "The testator," said his Honor, "introduces a condition in his will to prevent the marriage of his daughter Mary with H. T. After the making of his will, his daughter married H. T. with his express consent and approbation; and the condition is thus dispensed with. In coming to this conclusion I follow the cases of *Clarke v. Berkeley* (b), *Crommelin v. C.* (c), and *Parnell v. Lyon* (d).

But the consent of the testator will not dispense with a condition precedent, that is to say where the performance of the condition is necessary before any interest is taken by the intended legatee or devisee (e).

As to whether conditions requiring marriage with consent are broken by a first marriage without consent, so as to disable a legatee from taking upon a second marriage with consent, seems to be somewhat doubtful. In *Stackpole v. Beaumont* (f), where a legacy was given by a testator to his daughter, payable upon her marriage, if before twenty-one, with consent of trustees, the legatee having married before twenty-one, and without consent, *Loughborough*, C., held that the legacy was not then payable. Afterwards, having attained twenty-one, she married a second husband, and claimed the legacy, but *Leach*, M.R., thought himself bound by Lord *Loughborough's* decision from deciding in her favour (g). The point, how-

(a) 2 S. & S. 358.

(b) 2 Vern. 729.

(c) 3 V. 227.

(d) 1 V. & B. 479; see *Violett v. Brookman*, 26 L. J. Ch. 308. *Jarman* (1893), p. 893 (n.).(e) *Bullock v. Bennett*, 7 De G. M.& G. 283; *Younge v. Furze*, 8 De G. M. & G. 756; *West v. Kerr*, 6 Ir. Jur. 141; *Davis v. Angel*, 31 B. 223.

(f) 3 V. 89, 3 R. R. 52.

(g) *Clifford v. Beaumont*, 4 Russ. 325.

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ever, raised before *Leach*, V.-C., was not decided by *Loughborough*, C., and *Leach*'s, V.-C., judgment has been doubted (a). In *Randal v. Payne* (b), there was a bequest to J. and M., in case they married into certain families, and if they should not marry then over. Upon their marrying into other families Lord *Thurlow* (without suggesting that any forfeiture had thereby taken place) held that marrying with certain families being a condition precedent nothing could vest until it had taken place, and that they had their whole lives for the performance of the condition (c).

In *Lowe v. Manners* (d), however, a devise, subject to a similar condition, was held to be at once forfeited by marriage into another family. This case, however, is distinguishable from *Randal v. Payne* by the circumstance that, in *Lowe v. Manners*, from the day of marriage into another family each daughter was to be entitled to a fortune substituted for that given in the event of her husband having been one of the favoured families, thereby showing that the choice was only once tendered to her.

Where a condition against marriage was broken by a widow, who concealed her second marriage, her husband, who was aware of the condition, was held bound to *refund the income* which trustees had paid to her in ignorance of the marriage (e).

Persons will not be permitted to allow a long time to elapse without making any claim, and then to insist on a forfeiture and throw on the persons entitled the burden of proving that there has been none (f).

Ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of not complying with the condition (g), except where the devisee in such case is also heir-at-law of the deviser, for it has been expressly decided that neither neglect nor refusal to comply with a condition will subject an heir-at-law to the loss of an estate unless he has notice of the condition (h).

(a) *Beaumont v. Squire*, 17 Q. B. 905; *Davis v. Angel*, 31 B. 223.

(b) 1 Bro. Ch. 55.

(c) See *Duddy v. Gresham*, 2 L. R. Ir. 442.

(d) 5 B. & Ald. 917.

(e) *Charlton v. Coombes*, 4 Gif. 382; cf. *Preece v. Searle*, 3 Jur. (N.S.) 711.

(f) *Re Birch*, 17 B. 358, in which case 28 years elapsed.

(g) *Porter v. Fry*, Vent. 199; *Re Hodgson's Legacy*, 16 Eq. 92; *Astley v. Essex*, 18 Eq. 290.

(h) *Doe d. Kenrick v. Beaucherk*, 11 East. 657, 667; *Doe d. Taylor v. Crisp*, 8 A. & E. 778; *Murphy v. Broder*, 9 Ir. R. C. L. 123.

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7. Contract in Restraint of Marriage, or in Fraud of the Marriage Contract.

Certain agreements are treated as against public policy either as tending to impede freedom of consent and to introduce unfit and extraneous motives into the contracting of particular marriages, or for tending to hinder marriage in general (*a*).

But where a contract is divisible, one alternative which is valid will not be rendered invalid by another alternative which is void, as being in restraint of marriage. Thus in *Robinson v. Oumancy* (*b*), an unmarried woman, having a power of appointing a sum of money by will, made a will appointing it to a mortgagee and covenanted not to cancel, revoke, or annul the will. She afterwards became bankrupt, and obtained her discharge, and after her discharge, she revoked her will, and made another appointing the sum of money to another person. The C. A., affirming the decision of Kay, J. (*c*), held, that the covenant not to revoke the will was divisible, and was not wholly void, although in *one alternative it was in restraint of marriage*.

A contract to marry a particular person, when that person is not bound by corresponding obligation, will be cancelled: "it being contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion" (*d*).

A contract by which persons were mutually bound to marry each other has been held valid at law (*e*). But although the contract may have been mutual and valid at law a Court of equity has relieved against it, if it was a fraud upon a parent or a person *in loco parentis* from whom expectations were entertained: thus, a bond given to her suitor by a daughter, the father having forbidden her to see or encourage him, was, on the application of the daughter, set aside after the death of her father on the ground that had the father known of the bond and that the daughter had not submitted to his opinion about the match, he might probably have made other provisions for his daughter in his will, and was therefore a fraud upon the father. This decision was given although mutual bonds had been exchanged between the daughter and her suitor (*f*).

(*a*) Pollock, Contracts (1894), p. 334; Cock v. Richards, 10 V. 429, 8 R. B. 23; Hartley v. Rice, 10 East, 22.

(*b*) 23 C. D. 285.

(*c*) 21 C. D. 780.

(*d*) Key v. Bradshaw, 2 Vern. 102;

and see Woodhouse v. Shepley, 2 Atk.

535; Lowe v. Peers, 4 Burr. 2225;

(*e*) See Cock v. Richards, 10 V. 438, 439; and Atkins v. Farr, 1 Atk. 28;

S. C., 2 Eq. Ca. Abr. 247.

(*f*) Woodhouse v. Shepley, 2 Atk.

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A covenant to pay a woman a sum of money as long as she continues sole and unmarried is not illegal (a).

In another respect our Courts have not followed the civil law, by which *procuratores* of the Roman Law, or matchmakers, were allowed to stipulate for a reward not exceeding a certain amount, for promoting marriages; for it has been held in equity, from a very early period, that all contracts or agreements for promoting marriages for reward (usually termed marriage brokage contracts) are utterly void (b).

The vice of such a consideration was afterwards pleadable at law (c).

And so far has the principle been carried, that Lord *Redesdale* declared a bond void which was given as a remuneration to the obligee for having assisted the obligor in effecting an elopement and marriage without the consent of the wife's friends, although it was given voluntarily after marriage, and without any previous agreement for the same (d).

The fact of the match being an equal or proper one, will not render a marriage brokage contract valid (e); and such contract being contrary to public policy, is not capable of confirmation (f); and money paid pursuant to such contract has been recovered back in equity (g).

Upon the same principle, every contract by which a parent or guardian obtains any security for promoting or consenting to the marriage of his child or ward, is void (h). So, in *Duke of Hamilton v. Lord Mohun* (i), the mother being guardian, on the marriage of her daughter, insisted upon having from the intended husband a bond, in a penalty that he would give her a release of all accounts as guardian, within two years after the marriage. The bond was set aside, as the case was in the nature and within the reason of marriage brokage bonds, and that there was no difference between giving a bond for procuring a marriage, and a bond to release part of what became due.

(a) *Gibson v. Dickie*, 3 M. & S. 463.

(b) *Roberts v. R.*, 3 P. W. 76; *Heap v. Marris*, 2 Q. B. D. 630; *Chesterfield v. Janssen*, 2 V. 156; ante, p. 289. *Law v. L.*, Cas. t. Talb. 142; *Hall v. Thynne*, 1 Eq. Ca. Abr. 89, pl. 3, 3 P. W. 76, 3 Lev. 414.

(c) *Collins v. Blantern*, 2 Wils. 347.

(d) *Williamson v. Gihon*, 2 S. & L. 357, 362.

(e) *Cole v. Gibson*, 1 V. 506.

(f) *Cole v. Gibson*, 1 V. 506, 507; *Roberts v. R.*, 3 P. W. 76; and Cox's note (1).

(g) *Smith v. Brunning*, 2 Vern. 72; *Goldsmith v. Brunning*, 1 Eq. Ca. Abr. 89, pl. 4.

(h) *Keat v. Allen*, 2 Vern. 588; S. C. Pr. Ch. 267.

(i) 2 Vern. 652; Gilb. Eq. R. 297.

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Upon similar grounds, all contracts upon a treaty for a marriage, tending to deceive or mislead one of the parties to it, or their relatives, will be held void. Thus a security given by a son without the privity of his parents, who provided for him on his marriage, to return part of the portion of his wife, is void (a). So where, upon a marriage, a settlement was agreed to be made of certain property, by relations on each side, and after the marriage one of the parties procured an underhand agreement from the husband to defeat the settlement, it was set aside, and the original agreement carried into effect (b).

So, where a man, on the treaty for the marriage of his sister, let her have money, privately, in order that her portion might appear as large as was insisted on by the intended husband, and she gave a bond to her brother for the repayment of it, it was decreed to be delivered up (c). So, where a father, having, upon the marriage of his son, made a settlement of an annuity upon the wife in full for her jointure, and in lieu of dower, the son, privately, without the knowledge of his intended wife or her father, gave a bond to indemnify his father against the annuity or rent-charge, it was held void by Sir W. Grant, M.R., as a fraud upon the faith of the marriage contract (d).

Relief will be granted in such transactions, although the party to the marriage seeking it be *particeps criminis*; thus, in *Redman v. R.* (e), upon a treaty of marriage between A. and the daughter of B., B. would not consent to the marriage, because A. owed 200*l.* to C. A.'s brother thereupon gave his bond to secure the debt, and A.'s bond was cancelled; A., however, without the knowledge of B., but with the privity of his daughter, gave a counter-bond to his brother. Upon A.'s death, it was held, that the wife, though a party to the fraud, might set aside the bond; and the Lord Chancellor said, that if A. had been alive, and a party, he might also have been relieved.

The principle upon which this class of cases proceeds was much discussed in the case of *Neville v. Wilkinson* (f). There Mr. Neville, being about to marry, inquiry was made by the lady's father to what extent he was indebted. Wilkinson, who was applied to, at the desire of Neville concealed a demand which he had against him;

(a) *Turton v. Benson*, 1 P. W. 496; and see *Kemp v. Coleman*, Salk. 156.

(b) *Peyton v. Bladwell*, 1 Vern. 240; *Stribblehill v. Brett*, 2 Vern. 445; S. C., Pr. Ch. 165.

(c) *Galk v. Lindo*, 1 Vern. 475; and see *Lamlee v. Hanman*, 2 Vern. 499.

(d) *Palmer v. Neave*, 11 V. 165.

(e) 1 Vern. 343.

(f) 1 Bro. Ch. 543.

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after the marriage he attempted to recover it, and a bill was filed by Mr. Neville to restrain him. Lord *Thurlow* held, that Wilkinson, having made a misrepresentation, a Court of equity must hold him to it; observing that the principle on which such cases had been decided was, "that faith in such contracts was so essential to the happiness both of the parents and children, that whoever treats fraudulently on such an occasion, shall not only not gain, but even lose by it" (a).

But equity will not interfere if another equally innocent person would thereby be injured. Thus, in *Roberts v. R.* (b), A. treated for the marriage of his son, and in the settlement on the son there was a power reserved to the father to jointure any wife whom he should marry in 200*l.* per annum, he paying, or securing the payment, of 1000*l.* to the son. The father, treating about marrying a second wife, the son, pursuant to an agreement with the second wife's relations, released the 1000*l.*, but at or soon after the marriage took a new bond from his father, without the privity of the second wife or her relations. Upon a bill being filed by the father, Sir *Joseph Jekyll*, M.R., refused to set aside the bond given to the son observing, that, whatever arguments could be made use of in favour of the father's second wife or of the father, to prove that he ought to be discharged of the bond for payment of the 1000*l.*, the very same arguments might be urged on behalf of the son and his wife, to prove that it ought to be paid. Thus, supposing it to be a hardship upon the father's second wife that her husband should be forced to pay this 1000*l.*, in breach of the public and open agreement made by the son, was it not equally a hardship upon the son's wife, and as much a violation of the open and fair agreement made on her marriage, that the 1000*l.* should not be paid upon the father's making a second jointure, the consequence of which would be, that, as the agreement on the son's marriage was first, it ought to have the preference? *Qui prior est in tempore, potior est in jure* (c).

As to settlements or contracts by a woman about to be married in fraud of marital rights, see *Countess of Strathmore v. Bowes*, ante, and notes.

(a) And see *Scott v. S.*, 1 Cox, 366; *Shirley v. Ferrers*, cited 11 V. 536; *The Vauxhall Bridge Company v. The Earl of Spencer*, Jac. 67.

(b) 3 P. W. 65.

(c) See the remarks on this case in *Lee v. Hayes*, 17 Ir. C. L. R. (N. S.) 394.

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8. As to Conditions annexed to Gifts for the purpose of effecting the separation of Husband and Wife.

Upon principles of public policy it has been held, that where bequests are made to married women upon condition of their living separate from their husbands, the condition is void, being considered *pro non scripto*, but the bequest will be good (a).

This principle is not applicable where the bequest is of such a nature as not to influence the conduct of the husband and wife, and the bequest to the husband or wife living apart from each other is to take effect immediately on the death of the testator. See *Shewell v. Dymorris* (b) : in that case a testatrix made a bequest of a moiety of her residuary personal estate to her nephew, provided and on the express condition that he should be residing with his then present wife, if she should be living at the time of the testatrix's decease, but in case they should not at that time be living together as man and wife, then (subject as aforesaid) she gave and bequeathed one half of such moiety of the said residue unto the wife absolutely and the other half part thereof to the husband. It was held by Sir W. Page-Wood, V.-C., that the bequest was good notwithstanding the rule which avoids gifts providing for a future separation. "The rule," said his Honor, "which avoids gifts providing for a future separation between husband and wife does not apply to a case like the present. Here the gift is by will, and merely provides for either contingency, namely, that of the husband and wife living together or separate at the moment when the will must take effect, namely, at the death of the testatrix. The bequest cannot influence their conduct, but takes effect immediately on the death, according to the then state of facts."

As to separations effected between husband and wife by their mutual consent, see the note to *Stapilton v. S.*, post.

(a) *Tennant v. Brail*, Toth. 141; As to a limitation to the same effect, *Brown v. Peck*, 1 Eden's Rep. 140; see *Re Moore*, p. 562. supra.
Wren v. Bradley, 2 De G. & Sm. 49. (b) *Johns*, 172.

JOHN WRIGHT HENNIKER WILSON, Esq.
 APPELLANT, v. MARY WRIGHT HENNIKER
 WILSON (THE APPELLANT'S WIFE) AND OTHERS.
 RESPONDENTS.

1848. 1 H. L. Cas. 538; 5 H. L. Cas. 40.

Husband and Wife. Articles of Separation. Specific Performance.
 Jurisdiction.

The Court of Chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of property agreed upon.

The Court, in decreeing specific performance of such articles, does not inquire into the cause of the separation.

The stopping of a suit in the Ecclesiastical Court for nullity of marriage, on the ground of impotency of the husband, is a sufficient consideration to him for articles of separation; and so, it seems, is a covenant by a third party to pay his debts.

Semble, that the Court, after decreeing specific performance of the articles, may restrain the wife, as well as the husband, from proceeding in the suit for nullity (a).

THIS was an appeal against a decree for specific performance of articles of separation between the appellant and his wife the respondent. They were married in April, 1839. Differences arose between them soon after the marriage, and continued until May, 1843, when Mrs. Wilson, by advice of her friends, went to reside at the house of Mr. Foster, her solicitor. On the 8th of that month the appellant was served with a citation from the Consistory Court of London, in a suit for nullity of marriage by reason of impotency. The appellant called next day on Mr. Foster, expressed his anxiety to stop the suit and to enter into an amicable arrangement for a separation, and proposed to execute a proper deed for that purpose, and to give up

(a) 1 H. L. Cas. 556, 575, and *infra*, 588, 596.

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the interests which he took in his wife's property under their marriage settlement, and in virtue of his marital rights, in consideration of an annuity of 1,500*l*.

By the settlement executed previous to the marriage, a freehold estate in the county of Southampton, called Drayton Lodge, of the value of 2,000*l*. a-year, to which Mrs. Wilson was entitled for her life, for her separate use, with remainder to her issue, under the will of Lady Frances Wilson, was secured to the same use, together with 3,000*l*. consols, part of her own funds; and a leasehold house and premises, called the Chelsea Park estate, which, with the land tax charged thereon, she had purchased some time before the marriage, were settled to the use of the appellant during their joint lives, and to her, for her life, if she survived him, with remainder of the term absolutely to the appellant, his executors and assigns. The rest of the respondent's property—consisting of freehold estates in the counties of York and Essex, worth together about 3,000*l*. a-year, devised to her by Sir Henry Wilson, for her life, with remainder to her issue, with other remainders over; of a leasehold house in Grosvenor Place, in the county of Middlesex, bequeathed to her by the same will, and also of considerable sums of money in the public funds, in bank and on mortgage, and other personal estate of large amount,—was not included in the settlement, and therefore, after the solemnization of the marriage, belonged, as the settlement recited, to the appellant in his marital right (*a*).

The appellant was informed, on the 13th of May, that the terms of separation which he proposed to Mr. Foster would not be accepted, and that it was determined by Mrs. Wilson and her advisers to proceed with the suit in the Consistory Court. A notice to that effect was sent on the 25th of May to the appellant, who, on the next day, called again on Mr. Foster, and was informed that the libel in that suit would be filed on the 2nd of June then next ensuing, unless an arrangement was completed in the meantime. The appellant on the 26th of May again called on Mr. Foster, and with a view of preventing the suit, and the consequent publicity of the charge therein made, proposed (without prejudice) "to bind himself to enter into a deed of separation to be executed immediately, whereby Mrs. Wilson should be secured in the undisturbed enjoyment of Chelsea Park,

(*a*) See 14 Si. 405.

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with the furniture there, and at Drayton also; Mrs. W. to receive the rents of the adjacent property at Chelsea, paying the ground rents; the rents of the property in Yorkshire and Essex to be placed under the control of Mrs. W., there being reserved to Mr. Wilson a certain sum annually, which he would prefer hearing suggested by Mrs. Wilson or her advisers. In considering this amount, it should be recollected that Mr. W. had, in pursuance of the agreement made before marriage, effected policies of insurance requiring annual payments to the amount of 600*l*." This memorandum was dated May 26, 1843, and signed by Mr. W. H. Wilson.

Mr. Foster having submitted this proposal to Mrs. Wilson and her advisers, by their direction offered the appellant 1,000*l*. a-year out of the property, on his entering into a deed to carry the proposal into effect. The appellant required 1,200*l*. a-year, but finding after several discussions with Mr. Foster, on the 30th and 31st of May, that unless he accepted the annuity of 1,000*l*., the suit in the Consistory Court should proceed, he submitted to the terms proposed, and wrote and signed this memorandum: "The annual sum agreed upon on the part of Mrs. W. H. Wilson, to be paid to Mr. W. H. Wilson under the deed of separation, to be executed immediately, is 1,000*l*. The deed made to carry into effect the terms proposed in a memorandum dated the 26th of May, 1843, signed by Mr. H. Wilson, and to be a bar to suits; suit now pending to be withdrawn on the mutual execution of the agreement."

Articles of agreement for separation were immediately prepared, and the appellant—having before refused to appoint a solicitor, as being himself a barrister, and competent to conduct the negotiation—perused the draft and suggested alterations in it, and perused it again after it was finally settled on behalf of the respondent, and he assisted also in examining the engrossment.

The articles so prepared, dated the 1st of June, 1843 and made between the appellant of the first part, the respondent his wife, of the second part, and Nathan Wetherell, Esq., of Lincoln's Inn, and the said Mr. Foster, of the third part—after reciting that unhappy differences having arisen between the appellant and his wife, they had agreed to live separate, and to enter into the arrangements after-mentioned—witnessed that the appellant on the one part and the said N. Wetherell and W. C. Foster on the other part, with the privacy

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and approbation of Mrs. Wilson, mutually covenanted and agreed to the effect following :—

First. That the appellant should at all times thereafter permit Mrs. Wilson to live separate and apart from him, &c.

Secondly, That the Chelsea Park estate, and the land tax thereon, comprised in the marriage settlement of Mr. and Mrs. Wilson, and thereby settled as before stated, and all such other estates (if any) as might be purchased or taken in exchange under the provisions thereof, should, from and after the 24th of June, 1843, be held by the trustees of the said settlement, in trust for Mrs. Wilson, for her separate use during the joint lives of herself and the appellant, to the intent that his life interest in the premises during the life of Mrs. Wilson might be superseded ; but nevertheless without prejudice to his ultimate interests in the said premises expectant upon her decease.

Thirdly, That the estate in the county of Southampton, devised by Lady F. Wilson, and also the sum of 3,000*l.* consols, comprised in the marriage settlement, should remain subject to the trusts thereof.

Fourthly, That all other freehold, copyhold, and leasehold estates, to which Mrs. Wilson was, at the time of her marriage, or since become, entitled under the wills of Sir Henry and Lady Wilson should after the said 24th of June, subject, as to such of these estates as were situate in the county of York, to the annuity of 1,000*l.* after mentioned, be conveyed by the appellant to the trustees of the settlement, for the separate use of Mrs. Wilson, for the joint lives of her and the appellant.

Fifthly That all the furniture in the mansion at Chelsea Park should be held and enjoyed by Mrs. Wilson during her life, for her separate use, and after her decease should belong to the appellant, his executors, &c. ; and that all other goods and effects in the said mansion (except books belonging to the appellant) and all additions to be made thereto, and to the furniture, and all furniture, goods, and effects, in the mansion at Drayton Lodge, and all jewels, ornaments, wearing apparel, &c., belonging to Mrs. Wilson, and also all real and personal estate afterwards acquired by her, should belong absolutely to her for her separate use, with power to dispose of the same by deed, or will, &c.

Sixthly, That all rents, taxes, and other outgoings in respect of the

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Chelsea Park estate, and all expenses of repairs upon the same, should be paid by the appellant up to the same 24th of June.

Seventhly, That, if and so long as the appellant should duly observe and perform the said covenants and agreements— all the rents, taxes, and other outgoings in respect of the said several estates, and all expenses of repairs upon the same, should, after the 24th of June be paid by Mrs. Wilson during her life, and “that he, the said John Wright Henniker Wilson, his heirs, executors and administrators, and his and their estates and effects, should be indemnified therefrom and from all the present debts and liabilities of the said John Wright Henniker Wilson, by the joint and several covenant of the said N. Wetherell and W. C. Foster.”

Eighthly, That, if and so long as the appellant should duly observe and perform the covenants and agreements herein contained a clear annuity of 1,000*l.*, commencing from the 24th of June, should be paid to him by equal half-yearly portions, during the joint lives of himself and Mrs. Wilson, the said annuity to be charged on the freehold estates in the county of York which belonged to Mrs. Wilson before her marriage.

Ninthly, That a proper deed or deeds for effectuating the objects of the articles should, with all convenient speed, be executed by all the parties to these presents, “such deed or deeds containing all such covenants and provisions as should be deemed expedient,” to be settled on behalf of all parties by counsel; and that in case of any unnecessary delay in the execution of such deed or deeds by any of the parties, the other of them should be at liberty to make void these presents.

And lastly, That, upon the execution of these presents by the appellant, the proceedings instituted against him in the Ecclesiastical Court by Mrs. Wilson, should be suspended, and upon the execution of the deed or deeds to be so prepared as aforesaid, should be put an end to and withdrawn, but nevertheless without prejudice to Mrs. Wilson's right to institute any other proceedings against him, in case he should make default in the performance of any of these covenants and agreements.

These articles were executed by all the parties to them, and the proceedings in the suit, in the Consistory Court, were suspended.

The appellant having, at first, interposed some delay in quitting

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Chelsea Park, in compliance with the articles, soon afterwards, in the course of a correspondence with Mr. Foster, objected to them altogether, on various grounds hereinafter mentioned.

In August, 1843, Mrs. Wilson, by her next friend, and Messrs. Wetherell and Foster, filed their bill against the appellant, stating, among other things, that they, with the view of carrying the said articles into effect, had caused a proper deed to be prepared as thereby provided; that a clerical error occurred in the copying of the original draft of the 7th article, which mentioned that the appellant should be indemnified against his own debts instead of his wife's, as was intended, and that they caused to be substituted in the said deed the usual covenant for indemnifying the appellant against the debts and liabilities of his wife. The bill prayed that, subject to the correction of the said error, the appellant might be decreed to execute the deed so prepared for carrying the articles into effect, according to their true intent and meaning.

The appellant, in his answer, stated the various grounds on which he objected to perform the articles: that they were procured from him by intimidation, duress, and surprise: that he agreed to them from an apprehension of degradation and ridicule, by the exhibition against him of a charge of impotency, which was false, as Mrs. Wilson well knew; that in making the proposals of the 26th and 31st of May, and in executing the articles, he acted not only without due advice, but also under mental incapacity to contract, arising from apprehension of publicity being given to the said calumnious charge, and that Mrs. Wilson and her advisers instituted the suit in the Ecclesiastical Court, and took advantage of his alarm and apprehension, to coerce him into the arrangement; that her sole object was to obtain from him some concessions of property which he acquired under the marriage articles, or his marital rights, for which purpose she had previously threatened him with a divorce upon equally false charges of adultery and cruelty; and the suit for nullity of the marriage by reason of impotency, was another contrivance and device resorted to by her for the same purpose, without any belief in the imputation. He also insisted that the articles differed materially, to his prejudice, from his said proposals, and the draft deed prepared for his execution by the respondents, was itself a deviation from the articles, which did not contain any such clerical error as they

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alleged; that the suit instituted in the Consistory Court, although suspended, might still be prosecuted by Mrs. Wilson, notwithstanding the articles, so that he had no benefit or protection from the articles in that respect: but he repudiated such benefit, and stated that he would compel her to proceed in that suit, so as to give him an opportunity of refuting the false charge of impotency. He submitted that the articles, not being deliberately entered into by him, nor fairly, but fraudulently, obtained from him, were not binding on him; and as the respondents, Messrs. Wetherell and Foster, did not offer to perform their covenant, to pay his debts, exceeding 6,000*l.*, the articles were without any consideration to him, inasmuch as the covenant which they proposed to insert in the deed to indemnify him against Mrs. Wilson's debts, was never desired or contemplated by him, knowing, from her habits, and possessed as she was of large property, that she would not incur debts.

The appellant's proctor took a proceeding in the Consistory Court, to compel Mrs. Wilson to file her libel there. Her proctor obtained time to do so, and then she and the other respondents filed a supplemental bill in Chancery for an injunction to restrain the appellant from taking further proceedings to compel her to continue the said suit, or to dismiss it; and such injunction was issued, but was discharged upon the appellant's answer being put in.

In May, 1844, the appellant filed a cross bill, stating the contents of his answers to the original and supplemental bills, and that he had consummated the marriage, and charging that Mrs. Wilson admitted his competency, and that her imputation of his impotency would appear to be unfounded if she would proceed to proofs in the suit in the Consistory Court, to which he endeavoured to compel her; but she avoided the prosecution thereof, well knowing that she could not succeed therein. The cross bill prayed that the articles might be declared void, and be delivered up to be cancelled.

Mrs. Wilson in her answer repeated her denial that the marriage was ever consummated, and added that, to the best of her belief, it was not consummated by reason of the impotency or physical inability of the appellant, owing to some mal-conformation, &c. And she denied that the suit in the Consistory Court was instituted for such purposes as were alleged in the cross bill, but *bona fide* to obtain a sentence of nullity of marriage, to which she and her legal

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advisers, including eminent counsel and civilians, conceived her to be entitled; and she denied that she ever admitted to any person the appellant's competency.

Witnesses were examined in both causes, in the original cause by the respondents only, in the cross cause by both parties, and orders were made that the evidence taken in either cause might be read in the other.

The causes were heard by the Vice-Chancellor of England, in January and February, 1845, when his Honour rejected certain evidence proposed to be read on behalf of the appellant, * * * and declared, that, although the covenant, contained in the seventh article, to indemnify the appellant against his own debts, instead of his wife's, was an error committed by the conveyancer's clerk in copying the original draft of the articles, it could not be considered an error as between the appellant and the other parties; and as they had offered to covenant to indemnify him against his wife's debts, his Honour decreed that it be referred to the Master to settle a proper deed of conveyance for carrying into effect the articles of separation, and that he should insert therein a joint and several covenant by the respondents, Messrs. Wetherell and Foster, with the appellant, to indemnify him against all debts and liabilities of Mrs. Wilson which existed on the 1st of June, 1843, and all her subsequent and future debts and liabilities. [An order was made for the delivery up of the mansion at Chelsea Park by the appellant, and inquiries and accounts were directed. And it was ordered that an injunction should be awarded to restrain the appellant], until after execution of the said deed, from taking any proceedings in the suit instituted by Mrs. Wilson in the Consistory Court, for the purpose of compelling her to proceed therein, and from applying for any order of the said Court for the purpose of dismissing such suit, or otherwise putting an end to it, or whereby the respondents might be made liable for the costs thereof. [And that the bill, in the cross cause, be dismissed with costs.]

The appeal was against the whole decree.

Sir *Fitzroy Kelly* and Mr. *G. Turner* (Mr. *Busk* and Mr. *Henniker* being with them), for the appellant.—This case

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presents several points of great importance, never yet decided. The principal question is, whether a Court of Equity, considering the nature and contents of the articles, and the circumstances under which their execution was obtained from the appellant, has jurisdiction, and ought to exercise it, to compel specific performance of them. * * *

The articles executed, under surprise and misrepresentation, purport to be made between the appellant and wife, and Messrs. Wetherell and Foster, as trustees for her; they recite that Mr. and Mrs. Wilson had agreed to live separate; and the first article stipulates for such separation—which is contrary to the policy of the law and to moral duty: they contain no allegation of adultery or cruelty—which are the only justifiable grounds of separation, being those on which alone the spiritual Courts grant divorces, and on which the temporal Courts recognize articles of separation as beneficial private arrangements, resorted to for the purpose of avoiding public exposure; they contain no covenant, on the part of the trustees, to protect the husband against the wife's debts,—without which Courts of Equity have no jurisdiction to enforce the articles. The principal covenants are those by which Mr. Wilson gives up the property which he acquired by his marriage. And what is the consideration? Messrs. Wetherell and Foster covenant to indemnify him against his own debts; but their bill alleges that that is a clerical error, and prays it may be corrected by substituting a covenant to protect him against Mrs. Wilson's debts. The appellant never required or contemplated any such protection, knowing that she, with so large a property, and parsimonious habits, would not incur debts. The only consideration, therefore, for the appellant's resigning the enjoyment of at least 3,000*l.* a-year, for a life annuity of 1,000*l.*, was the suspension of the suit in the Ecclesiastical Court, which is no consideration at all, because Mrs. Wilson may, at any time, proceed with that suit, or institute another, notwithstanding the covenant of her trustees to stop it. * * *

The most eminent equity Judges disapproved of separation deeds, and expressed their surprise how they came to be recognised by any Court. Lord Rosslyn, in *Legard v. Johnson* (a), says: "The common law will not entertain a suit upon contract by a wife against her

(a) 3 V. 359.

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husband. The Ecclesiastical Court has exclusive cognizance of the rights and duties arising from the state of marriage." [And see *Heard v. H. (a)*, *Seeling v. Crawley (b)*, *Angier v. A. (c)*.] Lord Eldon frequently declared his repugnance to such deeds. In *Lord St. John v. Lady St. J. (d)*, he expresses strongly his dissent from the *dicta* that tell from judges in cases at law in favour of deeds of separation, which he considers to be contrary to the sacred nature of the contract of marriage, and to the policy of the law, that marriage should be indissoluble, except by the legislature: He further says that there could not be even a separation *à mensâ et thoro* except *propter sceleratum aut adulterium*, and that even where the parties, after such separation, came together again, there would be a complete end of it. And—after referring to deeds of separation, containing covenants by third persons to indemnify the husband against the wife's debts, on which the jurisdiction in equity was said to be founded, and which was exercised, for the first time, in *Guth v. G. (e)*, of which he disapproves, as Lord Rosslyn did in *Legard v. Johnson (f)*—he says: "Lord Thurlow doubted whether covenants with such objects ought to be the foundation either of action or specific performance. That doubt has long since had place in my mind. If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this Court. But if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject. It is better that the case should go to the House of Lords than that the law should remain in this state upon a point connected with the very well-being of society." [And see *The Earl of Westmeath v. The Countess of W. (g)*.] * * *

Sir William Grant says, in *Worrall v. Jacob (h)*: "It is now settled that this Court will not carry into execution articles of separation between husband and wife. It recognizes no power in

(a) 3 Atk. 547.

(b) 2 Vern. 386.

(c) Pr. Ch. 496; S. C., Gilb. Eq. Rep. 152.

(d) 11 V. 529.

(e) 3 Bro. Ch. 614.

(f) 3 V. 361.

(g) Jac. 135.

(h) 3 Mer. 268.

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them to vary the rights and duties growing out of the marriage, or to effect at their pleasure a partial dissolution of it." * * *

Now, as that covenant by a third party for indemnifying the husband against the wife's debts, which was in some of the preceding decisions held sufficient (a), and in all held to be indispensable, to support separation deeds, does not find a place at all in these articles; and the want of it cannot, as Lord *Eldon* said be supplied by a Court of equity; they contain no foundation for an action or suit in equity, and they are all directly within the principles laid down by Lords *Thurlow* and *Rosslyn* and *Eldon*, and by Sir *W. Grant*. The appellant, it is admitted, never desired any such covenant, and now resists the insertion of it in the articles; but he is not therefore precluded from insisting that without it the articles are void.

Reliance may perhaps be placed on the covenant to stop the suit in the Ecclesiastical Court—for which the appellant most anxiously stipulated—as a sufficient consideration for the articles. Can that covenant be enforced? Can the trustees or the Court of Chancery prevent Mrs. Wilson from proceeding in that suit? "That," says Lord *Eldon*, in *Westmeath v. W.*, "leads to a most important question, whether deeds of this kind raise such an equity between husband and wife as to authorize the Court of Chancery to prevent them from proceeding in the Ecclesiastical Court; for unless it could be carried to that length, I cannot see how they can be supported" (b); his Lordship having before said (c), "it was a question whether such a covenant would be binding," and that "none of the cases touched it in decision or in principle."

Courts of equity, and of law also, most anxiously avoid interference with the Ecclesiastical Courts, whose exclusive province it is to entertain causes matrimonial, and grant separations. * * * They cited *Durant v. D.* (d), *Beeby v. B.* (e), *Westmeath v. W.* (f), *Smith v. S.* (g), *Mortimer v. M.* (h), *Warrender v. W.* (i). But neither they, no more than the temporal Courts, sanction any act

(a) See *Seeling v. Crawley*, *Angier v. A.*, *supra*.

(b) *Jac.* 139.

(c) *P.* 136.

(d) 1 *Hag. Ec.* 760.

(e) 1 *Hag. Con.* 142, n.

(f) 2 *Hag. Ec. (Supp.)* 115.

(g) 2 *Hag. Ec. (Supp.)* 44 n.

(h) 2 *Hag. Con.* 318.

(i) 2 *Cl. & Fin.* 527 & 61.

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that would have the effect of preventing a return to cohabitation ; on the contrary, they promote and enjoin it, where there does not appear to be adultery or cruelty enough to warrant a separation. And when the husband and wife do return to cohabitation, whether by voluntary reconciliation or by decree for restitution of conjugal rights, there is an end to the separation, and to all the covenants in the deed, and all things are restored to the state in which they were before the separation ; *Fletcher v. F.* (a), *St. John v. St. J.* (b), *Bateman v. The Countess of Ross* (c), *Westmeath v. W.* (d). But how can things be restored in the present case, if this decree, compelling the husband to convey property worth from 2,000*l.* to 3,000*l.* a-year, for the benefit of the wife, be affirmed ? Can reconciliation, putting an end to the separation, re-vest in the appellant that property, after it is conveyed away absolutely by force of this decree ? The trustees may, by the wife's direction, have conveyed it away to strangers, before the reconciliation ; and if not, the retention of it will operate as a premium to the wife to reject all overtures towards reconciliation. . . . The injunction in effect enjoins perpetual separation of these parties ; because it prevents the husband from putting his wife to the proof of her charges, and from proceeding to negative them : after which he might graft on her libel his suit for restitution of conjugal rights ; *Clowes v. C.* (e). If, independently of the injunction, Mrs. Wilson cannot be prevented from proceeding in the pending suit, or instituting any other in the Ecclesiastical Court, the articles, for which the trustees' covenant to put an end to the suit was the sole consideration, are void. The House will, therefore, have to decide the question, whether she can be prevented.

[Lord Cottenham.—Is there not jurisdiction in equity to prevent her, as Mr. Wilson has been prevented, by injunction, as consequential on the decree for specific performance ? Courts of equity constantly restrain proceedings in the law courts, without any conflict of jurisdiction, because the injunction affects the parties, and not the Courts.]

In such cases the equity Courts have a concurrent, or the sole,

(a) 2 Cox, 107.

(b) 11 V. 532 & 537.

(c) 1 Dow, 245.

(d) 2 Hag. Ec. (Supp.) 52.

(e) 1 Curt. 145.

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jurisdiction over the subject-matter, but in causes matrimonial they have none, and no instance of their interference by injunction can be produced. There are strong observations applicable to this point—and to articles of separation generally—see *Warrender v. W.* (a), in this House. * * *

If Courts of equity will not interfere to stay a suit for divorce or restitution of conjugal rights, will they stay a suit for nullity of marriage? Assuming Mrs. Wilson's allegations, that she was defrauded into the state of marriage by an impotent person to be true, will they compel her to forego the proper legal process to get rid of the false marriage? But, be the allegations true or be they false, no Court can prevent her from trying to establish them (b).
* * *

[The learned counsel then proceeded to examine the Vice Chancellor's judgment (c), and the cases there referred to, some of which they had already cited.] * * *

The third and last ground of objection to the decree is the dismissal of the cross bill, and rejection of evidence material to the appellant's case. * * *

Mr. *Bethell* and Mr. *Lloyd*, for the respondents.—The arguments for the appellant have stirred up questions of law which have been long considered as settled. Upon all general principles now established and recognised in numerous decisions, not only of the Courts of law and equity, but also of this House, these articles are not open to any of the objections raised against them. The agreement was not, as alleged, for a future or prospective separation: these parties had lived in a manner separate for a considerable time, though the actual separation is to be dated only from the day on which Mrs. Wilson took up her residence at the house of her solicitor, which, however, was prior to the execution of the articles. One can easily understand the feelings of delicacy which prevented her from making an earlier disclosure of the appellant's impotency. That charge was the ground of the suit in the Consistory Court, and the articles were founded on a compromise of that suit. The appellant alleges in all his pleadings that the charge is false, but he

(a) 2 Cl. & Fin. 527.

St. John v. St. J.

(b) See observations of *Eldon*, C., in

(c) 14 Si. 414.

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does not swear that he consummated the marriage; he says in the cross bill that it was consummated, but Mrs. Wilson, in her answer, denies it, in the most solemn and circumstantial manner, and re-asserts the charge of his inability to consummate it.

They then dealt with the various pretences set up by the appellant against the validity of the articles, alleging that they were obtained from him by "conspiracy and intimidation;" by "fraud and falsehood" as to the grounds of the suit; by the "influence of fear, and apprehension of publicity, and consequent ridicule and degradation;" by "surprise" and "under mental incapacity to contract, and want of professional advice." * * *

Then as to the appellant's objections to the legal validity of the articles. The first was that all agreements for separation of husband and wife are contrary to public policy, to the policy of marriage, and to moral duty; and that to enforce them in equity or at law is an invasion of the jurisdiction of the Ecclesiastical Courts; but the Judges, whose doubts and *dicta* were cited in support of this objection, gave effect to such agreements in some of the cases that were referred to. [They cited *Legard v. Johnson* (a), *Fletcher v. F.* (b), *Worroll v. Jacob* (c), *Bateman v. The Countess of Ross* (d), *Tovey v. Lindsay* (e) * * * There is no case in which it has been said that a Court of equity is decreeing a separation of husband and wife, when it decrees performance of the husband's covenants in such deeds, over which it only exercises the same jurisdiction that it does on other executory agreements. There are, however, some classes of cases in which neither Courts of law nor equity will interfere in enforcing articles, as where they are made in contemplation of a future separation: *Durand v. D.* (f), *Durant v. Titley* (g), *Westmeath v. W.* (h), *Hindley v. Westmeath* (i); or in fraud of creditors; *Hobbs v. Hull* (k), *Legard v. Johnson* (l); or where an end is put to the separation by voluntary reconciliation, or decree of restitution of conjugal rights. *Head v. H.* (m), *Fletcher v. F.* (n). The present case does not fall within any of these classes.

(a) 3 V. 352.

(b) 2 Cox, 99.

(c) 3 Mer. 268.

(d) 1 Dow, 135.

(e) Id. 117.

(f) 2 Cox, 207.

(g) 7 Price, 557.

(h) Jac. 125.

(i) 6 B. & C. 200.

(k) 1 Cox, 445.

(l) 3 V. 352.

(m) 3 Atk. 547.

(n) 2 Cox, 99.

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The next objection to these articles is, that as they contain no covenant to indemnify the husband against the wife's debts they are void, for want of consideration. The omission of that covenant has been shewn to be a clerical error; and the respondents offered to supply it in the deed intended to carry the articles into execution which it is quite competent for them to do under the 9th article. *Stephens v. Olive* (a) was the first case in which any reliance was placed on such a covenant to support a deed of separation, but it does not follow that the absence of it would affect the validity of the articles; *Guth v. G.* (b), *Fitzer v. F.* (c), *Cooke v. Wiggins* (d), *Lynch v. Newman* (e), *Ross v. Willoughby* (f), *Wilson v. Massholt* (g), *Frampton v. F.* (h), *Hindley v. Westmeath* (i). The objection ill becomes the appellant, who admits that he sets no value on such a covenant, and never contemplated it. He has, besides, by the clerical error, obtained a better consideration in the trustees' covenant to pay his own debts, which the decree upholds. He has also the consideration of 1,000*l.* a-year, whereas, if the suit compromised by the articles had proceeded to a decree of nullity, he must give up, without any annuity, all the property which he acquired by the marriage. The stopping that suit was of itself a valuable and sufficient consideration: it was the only consideration, beyond the annuity, for which the appellant stipulated. Lord *Hardwicke* says, in *Fitzer v. F.* (k): "Considerations are not to be weighed in too nice scales." Where, however, there is a consideration for the husband's covenants, they will be enforced against him, even where there is no covenant, by a third party or trustee, to indemnify him, as appears in many cases from *Angier v. A.* (l), down to *Clough v. Lambert* (m).

Next comes the question whether a suit for nullity of marriage on the ground of impotency, may be compromised by an agreement for separation. The objection attempted to be raised against such a compromise, upon the supposition that there is some principle of public policy to prevent it, is wholly untenable. No principle is

(a) 2 Bro. Ch. 90.

(b) 3 Bro. Ch. 614.

(c) 2 Atk. 512.

(d) 10 V. 191.

(e) 4 B. & A. 419.

(f) 10 Price, 22.

(g) 3 B. & Ad. 743.

(h) 4 B. 287.

(i) 6 B. & C. 200.

(k) 2 Atk. 514.

(l) Pr. Ch. 296.

(m) 10 Si. 174.

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stated in support of the fancied distinction drawn between a suit of that sort and suits for divorce in the ordinary cases of adultery and cruelty, which are constantly compromised by private agreements for separation. The temporal Courts, in enforcing the agreement, do not inquire into the cause of separation, nor whether the spiritual Courts would grant a divorce. They have no jurisdiction or machinery for conducting such an inquiry : all they inquire into is whether the deed or articles of separation be a valid agreement, and shew sufficient consideration for the covenants between the husband and third parties. * * * Deeds or articles of separation generally recite that the husband and wife, in consequence of unhappy differences, have agreed to separate, but they seldom disclose the nature or causes of those differences. Adultery and cruelty may be, and often are, the causes ; but they are not essential to the validity of the agreement, and the supposition of their existence is excluded in many decided cases, in which other causes are expressly assigned. In *Sonky v. Golding* (a) the cause was "discord," and in *Seeling v. Crawley* it was "a quarrel." In *Heud v. H.* (b) the wife's "infirmities" were the cause ; in *Fletcher v. F.* (c), her "expensiveness." The cause is not mentioned in the reports of *Guth v. G.* (d), *Stephens v. Oliver* (e), *Compton v. Collinson* (f), *Jec v. Thurlow* (g), *Fitzer v. F.* (h), *Cooke v. Wiggins* (i), or *Frampton v. F.* (k), but that it was not for adultery or cruelty appears clear enough. Whenever these or other justifiable causes of separation exist, and the articles show a valuable consideration for the husband's covenants, they will be enforced, even though there is no third party or trustee ; *Angier v. A.* (l), *Clough v. Lambert* (m).

The injunction restraining the appellant from proceeding in his wife's suit, in the Ecclesiastical Court, is consequential on the decree for specific performance of the articles, one of which provided for the termination of that suit. It is contended that it has the effect of a sentence of perpetual separation, inasmuch as it prevents the appel-

(a) *Carey*, 124.(b) 3 *Atk.* 547.(c) 2 *Cox*, 99.(d) 3 *Bro. Ch.* 614.(e) 2 *Bro. Ch.* 90.(f) *Id.* 377.(g) 2 *B. & C.* 547.(h) 2 *Atk.* 511.(i) 10 *V.* 191.(k) 4 *B.* 287.(l) 1 *Tr. Ch.* 497.(m) 10 *Si.* 174.

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lant from suing for restitution of conjugal rights, which, it is said in *Fletcher v. F. (a)*, *St. John v. St. J. (b)*, and *Westmeath v. W. (c)*, a Court of equity has no power to do. The injunction does not go to that extent, although, if it did, there appears to be no reason for saying that the Court may not, on the application of the trustees, prevent the appellant from a breach of his contract, after a decree for specific performance. The injunction was not an invasion of the jurisdiction of the Ecclesiastical Court, but was intended to preserve the jurisdiction of the Court of Chancery over its own decree, and to prevent the appellant from defeating it, by resorting to another Court. In *Hill v. Turner (d)*, Lord Hardwicke restrained a woman, who married a ward of Court clandestinely, from proceeding in the Ecclesiastical Court against the infant for restitution of conjugal rights, or against his guardian for alimony. In *The Bishop of Winchester v. Paine (e)*, a party was restrained by injunction from obtaining probate of a will by fraud. This injunction had for its object to compel obedience to the decree; if that is not sustained, the injunction falls with it; but if it is sustained, the appellant has no reason for complaining of the injunction. * * * [They then considered the rejection of the evidence by the Vice-Chancellor]

Sir F. Kelly, in reply. * * *

THE LORD CHANCELLOR (*f*).—In this case the articles of separation are between the husband, of the first part, the wife of the second part, and two trustees of the third part, reciting that the husband and wife had agreed to live separate and apart. The agreement is between the husband on the one part, and the two trustees, with the privity and approbation of the wife, on the other part; and it provides, first, that the wife may live separate; secondly, that the husband shall give up, for the use of the wife, certain property belonging to her, but in which he had a life estate under the marriage settlement; thirdly, that certain other estates, not included in the marriage settlement, should be enjoyed by the

(a) 2 Cox, 99.

(b) 11 V. 527.

(c) Jac. 125; 1 Dow & Cl. 547.

(d) 1 Atk. 515.

(e) 11 V. 199 (see quere, as to the point).

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(f) The case was partly heard in 1846, by Lord Lyndhurst (then Chancellor), Lord Brougham, and Lord Cottenham. It was fully heard in 1847, by Lord Cottenham (then and in 1848 Chancellor) without any law lord.

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wife for her separate use during their joint lives, subject to an annuity of 1,000*l.* a-year to the husband; fourthly, it provides for securing to the wife certain jewels, furniture, and other articles, and securing to the husband 1,000*l.* per annum; then it provides for executing a proper deed to effect these objects; and, lastly, it provides for putting an end to a suit instituted by the wife for nullity of marriage, conditioned if the husband should keep this contract.

The decree against which the appeal has been presented, directed a specific performance of these articles, and the execution of a proper deed for that purpose, with the necessary inquiries and directions; and it restrained the husband from any proceeding to compel the wife to proceed in the suit in the Ecclesiastical Court, or to pay the costs; and it dismissed the husband's cross cause, and ordered him to pay the costs of both suits.

The appeal was attempted to be supported upon two grounds: first, on the ground that the articles had been obtained by intimidation and duress—this, I think, wholly failed, and the cross bill was properly dismissed, with costs;—and, secondly, because Courts of Equity ought not to entertain jurisdiction for performance of articles of separation.

The second head gave rise to a very protracted and learned argument, in which very many cases were cited, but of which very few of the later date, seem to me necessary to be adverted to; for if those later cases, particularly some which have been decided in this House, have settled the law, all those which preceded them may be thrown aside.

It must be observed that the decree appealed from does not touch the question of separation, but only makes provision for a previous contract for that purpose; and enforces a contract respecting property growing out of such separation. If an agreement for the separation and living apart of a husband and wife be so contrary to public policy, and therefore illegal, as to make void all arrangements of property arising from it, then, in all cases, the only question would be, whether the arrangement of property was in consideration of or dependent on such illegal agreement. But what has this House decided upon the subject? In the very recent case of *James v. White* (a) the question was whether the execution of a deed

(a) 9 Cl. & Fin. 101.

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of separation was a sufficient consideration for the agreement in question there, or whether it was illegal and void. Chief Justice *Tindal* said: "My brothers and myself are of opinion that there is no illegality disclosed by this agreement; one part of the consideration for it is the execution of the deed of separation which, as clearly appears from the declaration, was previously agreed upon and drawn up."

A case of *Bateman v. The Countess of Ross* (a) had previously (in 1813) occurred in this House, in which Lord *Eldon* and Lord *Redesdale* held an award good, which confirmed an arrangement of property "provided the husband and wife shall continue to live separate and apart;" Lord *Eldon* saying: "It was objected to the award that it assumed the jurisdiction of the Ecclesiastical Court in awarding a separation; but it did no such thing, it only assumed that there must be a separation, and provided accordingly." This case coming after that of *St. John v. St. J.* (b), takes off much from the weight of Lord *Eldon's* observations in that case.

In *Westmeath v. W.* (c) the objection was, that the deed provided for a future separation; and there Lord *Eldon* says, "I apprehend that any instrument which provides for a present separation, and which prospectively looks to the parties living together again, and then to a future separation, that such a deed, so far as it provides for that future separation, will never be carried into effect."

The authorities in this House are therefore against the appellant; and a now long train of authorities at law and in equity has proceeded upon the same ground, but I will only mention the case at law of *Wilson v. Musshett* (d). In *Frampton v. F.* (e), Lord *Langdale* considered the principle established; and the Vice-Chancellor has held the same in several cases, such as *O'ough v. Lambert* (f), and *Wellesley v. W.* (g).

It was contended that there was no consideration for the deed because there was no indemnity against the wife's debts, but only against those then owing by the husband. That, under the circumstances, was probably a more valuable indemnity than the other

(a) 1 Dow, 235.

(b) 11 V. 528.

(c) 5 Bli. 367; 1 Dow & Cl. 519.

(d) 3 B. & Ad. 743.

(e) 4 B. 287.

(f) 10 Si. 174.

(g) Id. 256.

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would have been; and there are other ample considerations for the deed. One part of the consideration is the provision as to the suit in the Ecclesiastical Court. The stopping of those proceedings appears to have been an important object to Mr. Wilson—of the reason for which he was the best judge—and that alone was a sufficient consideration. In *Bateman v. The Countess of Ross* (a), there was a suit pending for a divorce. Why is not the compromise of such a suit to afford consideration for an agreement? Is it desirable that the parties should be compelled to bring such complaint in the Ecclesiastical Court to public discussion? A similar answer applies to an argument, for which no authority was cited, that the Court will enforce such agreement only in cases in which the wife might have obtained alimony in an Ecclesiastical Court. How is a Court of equity to try that? and upon what principles can such a rule stand? If the consideration or fact of separation does not contaminate all that proceeds from it, the Court is only exercising its ordinary jurisdiction in giving effect to the arrangement of property agreed upon.

It was then said that the suit for nullity might end in a sentence for restitution of conjugal rights, and that the injunction was calculated to prevent that object. It only prevents an unjust use being made by the husband of the wife's proceedings, instituted for a very different purpose, and does not interfere with any proceeding that the husband may adopt. It was said that there was nothing to prevent the wife prosecuting that suit. This Court does not interfere by injunction, when there is no prospect of danger, and if it should arise, the question might be raised in another suit.

The documents rejected were, I think, inapplicable, and if produced, could not have had any effect, and were, I think, properly rejected.

I therefore advise your Lordships to affirm the whole of the decree, and to dismiss the appeal, with costs.

It was ordered accordingly. [See the decree, Seton (1893), F. 1, p. 812.]

(a) 1 Dow, 135.

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NOTES.

1. Contracts between husband and wife for separation, p. 597.
2. Consideration, p. 602.
3. Breaches of contract in agreements for separation, p. 602.
4. Other points connected with agreements for separation, p. 608.
5. Contracts for future separation, p. 611.

1. Contracts between Husband and Wife for Separation.

"There was a time when an agreement for separation between husband and wife was considered contrary to public policy. That opinion was rendered untenable by the decision of the House of Lords in *Wilson v. W.*, and since that decision it is clear that such an agreement cannot be said to be against public policy" (*a*). And it is in the highest degree desirable for the preservation of the peace and reputation of families that such agreements should be encouraged (*b*).

The Chancery Division will therefore enforce the specific performance of contracts for *present* separation, if the contract be otherwise valid; that is, if it be made between persons capable of contracting, and upon good consideration (*c*), and specific performance of an agreement for a separation deed, if *complete*, will be enforced (*d*).

As to the wife's ability of contracting with her husband, in *Vonsittart v. V.* (*e*), Lord *Hatherley*, in *Gibbs v. Harding* (*f*), was of opinion that a wife suing her husband for a divorce was in a position to contract with him for the abandonment of the suit, in consideration of an annuity paid by him, without the intervention of a trustee, the husband and wife being then "both at arm's length."

In *Besant v. Wood* (*g*), where it was held that a husband was entitled to specific performance of a contract by his wife that they should live apart, *Jessel*, M.R., in respect of a married woman's ability to contract herself out of her rights in the Divorce Court was

(*a*) Per *Lindley*, L.J., in *McGregor v. M.*, 21 Q. B. D. 430.

(*b*) Per *Sir James Hannen*, in *Marshall v. M.*, 5 P. D., p. 23.

(*c*) *Besant v. Wood*, 12 C. D. 605; *Fry*, Specific Performance, 1892, p. 691; *Seton* (1893), p. 813, F. 1 and 2.

(*d*) *Hart v. H.*, 18 C. D. 671; *Seton* (1893), F. 1, p. 812.

(*e*) 4 Kay & J. 62; and see *Cahill v. C.*, 8 App. Cas., p. 431, explained in *Butler v. B.*, 16 Q. B. D., p. 378; *Nicholl v. Jones*, 3 Eq. 696; *Gibbs v. Harding*, 5 Ch. 338; *Bateman v. Ross*, 1 Dow, 235. And see the distinction taken in *Walrond v. W.*, *John*, 18.

(*f*) *Supra*.

(*g*) 12 C. D. 622.

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of opinion that if a married woman can compromise a suit after it has been instituted, by agreeing to live separate upon terms as regards maintenance of herself, custody of the children, and so forth, there is no reason why she should not have power to enter into such an agreement after the quarrel and before the litigation began : that, as a necessary corollary to the right to sue by herself, she must have the right to contract not to sue, and that therefore a woman can contract to live separate and apart from her husband (a).

In *McGregor v. M.* (b) the plaintiff had applied to the police for protection against the defendant, her husband, and in June, 1886, she took out a summons for assault. The defendant thereupon took out a cross summons against the plaintiff. When the summonses were about to be heard negotiations took place between their respective solicitors, and it was thereupon agreed between plaintiff and defendant that they should live separate; that defendant, the husband, should pay plaintiff £l. per week, and that she therewith should maintain herself and her children; that she should indemnify him against all debts contracted by her, and that the summonses should be withdrawn. On an action by the wife on the agreement it was held the action was maintainable. There was no intervention of a trustee for the wife; there was no matrimonial suit; there was no writing (c). The C. A. (d) held, that the agreement between the husband and wife was valid, as it fell within the exception to the general rule as to the incapacity of the husband and wife to contract with each other, such exception being that *all* proceedings which the husband and wife are capable of taking against each other may be compromised (e); that there was sufficient consideration to support it, namely, the withdrawal of the summons; that there being a valid consideration, there was no necessity for a trustee; and that the Statute of Frauds did not apply, the consideration being executed.

Lindley, L.J., in the above case pointed out that the object of interposing a trustee in such cases was, that the contract between the husband and wife being *primæ facie* void, the trustee was interposed in order that his covenant to indemnify the husband

(a) See *Hart v. H.*, 18 C. D. 370; *Gandy v. G.*, 7 P. D., p. 80; *Rose v. R.*, 5 P. D. 100; *Cahill v. C.*, 8 App. Cas., p. 431; *Clark v. C.*, 10 P. D., pp. 193, 195; *Butler v. B.*, 16 Q. B. D. 374; *McGregor v. M.*, 21 Q. B. D., p. 431; *Aldridge v. A.*, 13 P. D. 214.

(b) 21 Q. B. D. 424.

(c) See s. 4 of the Statute of Frauds.

(d) *Brett, M.R.*, *Lindley and Bowen*, L.JJ.

(e) See judgment of *Lindley, L.J.*, p. 430.

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might afford a consideration for the husband's promise, but that where there is a valid consideration as between husband and wife, there is no need of a trustee (a); and *Bowen*, L.J., was of opinion that, assuming the contract a valid one, there was no necessity for a trustee, and that the Married Women's Property Act, 1882 gives power to make such a contract without the intervention of a trustee (b).

And, *semble*, that if a wife has independent rights, and is *bonâ fide* about to make a claim in respect of them, a compromise by which she undertook not to proceed with such claim would be sufficient, even though no proceedings had been actually commenced (c).

A recital in a deed to which the wife is a party of an agreement to live separate is evidence of a contract by her to allow her husband to live separate from her, and after taking benefits under the deed she cannot be heard to say she had not so contracted, although there was no covenant by her, but only by her trustee (d).

The Court, moreover, will do its utmost to decree specific performance of such a complete agreement, when it has been *partially performed*, though it may be somewhat vague in its terms. Thus, in *Hart v. H.* (e), a suit having been instituted by a husband against his wife for a divorce on account of adultery, a compromise was signed by the husband and wife in these terms: "Petition and answer dismissed; deed of separation with usual covenants; costs of preparing deed to be borne by Mr. H.; Mr. H. to pay Mrs. H. for herself and child or children 150*l.* a year quarterly; Mrs. H. to maintain the child or children; Mr. H. to pay wife's costs. In case of difference in working out these terms, matter to be referred to Mr. W. and Dr. D." (the leading counsel on each side). It was held by *Kay*, J., that the agreement was not too vague, and being on the face of it *complete*, the arbitration clause could only come into force in case of difference between the parties, and did not oust the jurisdiction of the Court to settle the deed, and a decree was made for specific performance, the deed of separation to be settled in chambers in case the parties differed (f).

(a) 21 Q. B. D., p. 431.

(b) *Ib.*, p. 432; see *Hart v. H.*, 18 C. D., p. 684. And see *Sweet v. S.*, (1895) 1 G. B. 12.

(c) See judgment of *Brett*, M.R., *Ibid.*, p. 427, and see further *Wilson v. W.*, *supra*; *Hart v. H.*, 18 C. D. 670; *Hobbs v. Hull*, 1 Cox, 445. And see

Aldridge v. A., 13 P. D. 211.

(d) *Clark v. C.*, 10 P. D. 188. Cf. *Williams v. Bailly*, 2 Eq. 731.

(e) 18 C. D. 670.

(f) See *Wilson v. West Hartlepool Ry. Co.*, 2 De G. J. & S. 475. And in *McGregor v. M.*, *supra*, the consideration was held to be executed.

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It is a principle of the Court that it will not compel specific performance of *executory* contracts—that is, contracts which are not intended by the parties to be final (*a*)—unless it can execute the whole contract on both sides (*b*). So where there are any stipulations in an agreement for separation contrary to law or public policy, a Court of equity will not, even if it be made on sufficient consideration, separate one portion of it from the other, and decree specific performance of part but will refuse to decree specific performance altogether. Thus, in *Tansillart v. V.* (*c*), by a memorandum of agreement made between a husband and his wife who was suing him for a divorce, it was agreed that a deed of separation should be executed, containing, among other provisions therein mentioned, provisions that two of their children should be placed entirely in the custody of the wife, and that none of the children should be sent to any school in Berkshire, or at a less sum than 60*l.* a year for each child, and that neither of the two eldest sons should be sent to any school without the written consent of both husband and wife, unless to certain specified places of education. It was held by the full Court of Appeal (affirming the decision of Sir W. Page-Wood (*d*)), that the provisions as to the children were contrary to public policy, as interfering with the due discharge of the father's duties with respect to them; and that on this ground, apart from all other objections, a decree for the execution of the deed of separation could not be made (*e*).

By the Custody of Infants Act, s. 2 (*f*), it is provided that, "No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

In *Hart v. H.* (*g*) there was an agreement for a separation deed, one term of which was that Mrs. H. was to maintain the child or children.

(*a*) Fry, Specific Performance (1892), p. 16.

(*b*) Fry, Specific Performance (1892), p. 380.

(*c*) 2 De G. & J. 249.

(*d*) 4 Kay & J. 62.

(*e*) See also *Walrond v. W.*, John. 18; *Hope v. H.*, 8 De G. M. & G.

731; *Gibbs v. Harding*, 5 Ch. 336; *Hamilton v. Hector*, 6 Ch. 701.

(*f*) See 36 & 37 Vict. c. 12, s. 2, *supra*, p. 531; Judicature Act, 1873, s. 25, s.-s. 10; Custody of Children Act, 1891, s. 3, p. 533, *supra*.

(*g*) 18 C. D., p. 682.

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Kay, J., in ordering specific performance of the agreement, said that the Act had removed what otherwise might have been possibly a difficulty (a).

But an agreement by a husband who is petitioner in a suit for the dissolution of his marriage on account of the adultery of his wife, to withdraw from the suit in consideration of a sum of money paid and to be secured by the co-respondent, has been held to be a fraud upon the Divorce Act (b), and void as against public policy (c).

Where, however, an agreement has ceased to be executory, as where a separation deed has been executed (d), equity will enforce those of its stipulations which are in accordance with the law, although it may also contain others which are contrary to the law or public policy (e).

But if a wife induces her husband to execute a deed of separation, in contemplation by her of her renewal of an illicit intercourse, it would be fraudulent as against the husband, and the deed will be void (f); and so where the deed had been executed upon the faith of the false assurance by the wife that she has not committed adultery (g).

But where in a separation deed there is a covenant by which the husband undertakes to pay his wife an annuity without restricting his liability to such time as she shall be chaste, it is good and is not against public policy, and the covenant remains in force and the annuity continues payable, although the wife afterwards commits adultery (h). But *scilicet*, that if the covenant had been inserted in the separation deed with the intent that the wife might be at liberty to commit adultery, the deed would have been void (i).

A deed of separation is a good answer to a husband seeking by *habeas corpus* to obtain the person of his wife (k).

(a) See *Besant v. Wood*, 12 C. D. 605; *Hunt v. H.*, 28 C. D. 606; *Jump v. J.*, 8 P. D. 159.

(b) 20 & 21 Vict. c. 85.

(c) *Gipps v. Hume*, 2 John. & H. 517. Cf. *Browne v. Brine*, 1 Ex. D. 5.

(d) *Fry, Specific Performance* (1892), p. 16, s. 39.

(e) *Vansittart v. V.*, 2 De G. & J. 255; *Wahond v. W.*, 1 John. 18; *Re Matthews*, 26 B. 463; *Swift v. S.*, 13 W. R. 378; *Hunt v. H.*, 4 De G. F. & J. 221; *Marshall v. M.*, 5 P. D. 19;

Clark v. C., 10 P. D. 188; *Aldridge v. A.*, 13 P. D. 210; *Fry, Specific Performance* (1892), p. 384, s. 841; *Hamilton v. Hector*, 13 Eq., p. 524.

(f) *Evans v. Carrington*, 2 De G. F. & J. 481.

(g) *Brown v. B.*, 7 Eq. 185.

(h) *Fearon v. Aylesford*, 14 Q. B. D. 792; *Sweet v. S.*, (1895) 1 Q. B. 12.

(i) *Fearon v. Aylesford*, *Per Cotton, L.J.*, on the authority of *Evans v. Carrington*, 2 De G. F. & J. 481.

(k) *King v. Mead*, 1 Burr. 512; *King v. Winton*, 5 T. R. 91.

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2. Consideration.

The following are instances of sufficient consideration:—A covenant by the wife's trustees to indemnify the husband against the wife's debts (*a*), even when conditional upon an annuity which was covenanted to be secured being secured (*b*): a contract by a third party to pay the husband's debts (*c*): a contract by the wife's father that the husband and wife should live apart and that he (the father) should pay half the costs of the separation deed (*d*): a renunciation by the husband of his rights in the wife's property (*e*): an agreement between the husband and the wife's father that a deed of separation should contain all usual and proper clauses was held to be founded on good consideration, inasmuch as (*inter alia*) a covenant on the part of the father to indemnify the husband against the wife's debts would, under those words, be included in the deed as a proper and usual clause (*f*). As to agreements to compromise matrimonial suits, see *Wilson v. W.* (*g*), and as to an agreement to compromise any litigation as to the wife's rights, or, *semble*, any intention to litigate in respect of them, see *McGregor v. M.* (*h*).

An agreement by a wife who has property settled to her separate use without power of anticipation on a separation to indemnify her husband against debts, will not amount to valuable consideration, as a married woman has no power to contract so as to bind property of that description (*i*). But in *Sweet v. S.* (*k*), (since the Married Women's Property Act, 1882), the contract by the wife alone not to molest and annoy the husband was treated as binding.

3. Breaches of Contract in Agreements for Separation.

The Ecclesiastical Courts considered a separation by private arrangement as an illegal contract, implying a dereliction of stipulated duties, which the parties were not at liberty to desert, and, consequently, entirely disregarded it as a bar to a suit for the restitution of conjugal rights (*l*).

(*a*) *Stephens v. Olive*, 2 Bro. Ch. 90; *Westmeath v. W.*, Jac. 126, 141; *Elworthy v. Bird*, 2 S. & S. 372; *Worrall v. Jacob*, 3 Mer. 256; *Logan v. Birkett*, 1 My. & K. 220.

(*b*) *Wellesley v. W.*, 10 Si. 256.

(*c*) *Wilson v. W.*, *supra*.

(*d*) *Gibbs v. Harding*, 5 Ch. 336.

(*e*) *Marshall v. M.*, 5 P. D., p. 23.

(*f*) *Ib.*

(*g*) *Supra*, and *Hart v. H.*, 18 C. D., p. 685.

(*h*) 21 Q. B. D. 424, judgments of the M.R. and *Lindley*, L.J.

(*i*) *Walrond v. W.*, John. 18.

(*k*) *Sweet v. S.*, (1895) 1 C. B. 12.

(*l*) *Mortimer v. M.*, 2 Hag. Con. 318; *Westmeath v. W.*, 2 Hag. Ec. App. 115; *King v. Samson*, 3 Adams, 277.

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But a Court of equity (before the passing of the Judicature Acts) would, where a valid contract for separation had been entered into between husband and wife, grant an injunction to restrain proceedings by either party in the Ecclesiastical Court for restitution of conjugal rights (*a*).

And now as the Divorce Court is part of the High Court of Justice, and bound, like the other Divisions to administer equity, the breach of a covenant in a separation deed will no longer be restrained by injunction in equity (*c*) if such a suit be instituted in the Divorce Court, but the breach should now be pleaded in that Court as an equitable defence in such proceedings (*d*).

And the Chancery Division will enforce a deed of separation, and will not be debarred from restraining a wife from commencing an action for restitution of conjugal rights by reason of trifling breaches of covenant on the husband's part (*e*).

The Court, moreover, will restrain a husband from personally molesting his wife (*f*), and a wife from personally molesting her husband (*g*), contrary to covenants contained in deeds of separation (*h*).

A wife by being party to a separation deed recognizes its recitals (*i*), and such recitals may be taken as evidence of a contract between the husband and wife, which may be an equitable defence to a petition by the wife for restitution of conjugal rights, although the covenants in the deed are not by the wife but by the trustees, for in such a case she cannot be heard to say there is no agreement by her (*k*).

And an agreement, although not by deed, will act as a bar, as in *Aldridge v. A.* (*l*), where a husband and wife agreed to separate, and that neither should make any claim against the other in law or equity. The husband afterwards presented a petition for a declaration of nullity. The wife set up the agreement, and the question of

(*a*) *Hill v. Turner*, Atk. 515; *Wilson v. W.*, 1 H. L. Cas. 538, 556, 575; *Hunt v. H.*, 4 De G. F. & J. 221; reversing the decision of *Romilly*, M.R., 31 B. 89.

(*b*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24.

(*c*) See Judicature Act, 1873, s. 25, s.-s. 5.

(*d*) *Marshall v. M.*, 5 P. D. 22.

(*e*) *Besant v. Wood*, 12 C. D. 605, 630; *Hart v. H.*, 18 C. D. 670.

(*f*) *Sanders v. Rodway*, 16 B. 207.

(*g*) *Flower v. F.*, 20 W. R. 251.

(*h*) *Williams v. Poley*, 2 L. J. 751; *Kitchin v. K.*, 19 L. J. (N.) 867; *Buckmaster v. B.*, 1 P. & D. 713.

(*i*) Per *Baggallay*, L.J., in *Clark v. C.*, 10 P. D. 192.

(*k*) *Clark v. C.*, supra. Compare *Williams v. Poley*, 2 L. J. 751.

(*l*) 13 P. D. 210.

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law was ordered to be decided first (*a*), with the result that the petition was dismissed.

In *Gooch v. G.* (*b*) the parties had separated under a deed dated in 1886, which provided that no proceedings should be commenced or prosecuted by either party against the other in respect of any cause of complaint which then existed, or had arisen before the date of the deed. In 1890 the wife presented a petition for judicial separation on the ground of adultery in 1889 and 1890, whereupon the husband charged his wife with adultery in 1884. Both parties were found guilty. Held, that such words did not prevent the husband from setting up his wife's adultery *as a defence*. If the agreement had been framed as in *Rose v. R.* (*c*), the result would have been different, for there is no rule which prevents parties from agreeing that they will not found an application to the Court on past misconduct (*d*). But they cannot contract the Court out of its duty (*dd*).

The covenants in separation deeds are not so far reciprocal that the observance of the one is a condition subsequent, on the breach of which the other fails. Thus, a breach of covenant not to molest is no answer to a breach of covenant to pay an annuity (*e*).

A suit by a wife for judicial separation is no breach of a covenant not to "molest or disturb" the husband (*f*), and neither adultery alone by the wife, nor adultery by her followed by the birth of a spurious child, is a breach of a covenant in a separation deed against molestation by the wife (*g*). But *semble*, adultery by the wife, followed by the birth of a spurious child whom she puts forward as the child of her husband, especially if this is done with intent to claim a title or property to which the legitimate offspring of her husband would be entitled, is evidence of a breach of a covenant against molestation by her (*h*).

And a husband is not debarred from enforcing a deed of separation, and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part. But he may so misconduct

(*a*) R. S. C. 1883, O. 25, r. 2.

(*b*) (1893) P. 99.

(*c*) p. 605, *infra*.

(*d*) See *Rowley v. R.*, 1 L. R. H. L. Sc. 63; *Besant v. Wood*, 12 C. D. 605; *Gandy v. G.*, 7 P. D. 77, 168; *Rose v. R.*, p. 605, *infra*.

(*dd*) *Good v. G.*, at p. 107.

(*e*) *Fearon v. Aylesford*, *infra*; *Hart v. H.*, 18 C. D., p. 683.

(*f*) *Thomas v. Everard*, 6 H. & N. 448.

(*g*) *Fearon v. Aylesford*, 14 Q. B. D. 792; *Sweet v. S.*, (1895) 1 Q. B. 12.

(*h*) *Fearon v. Aylesford*, 14 Q. B. D. 792.

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himself as to lose his right to insist upon her covenants not to institute matrimonial suits (a). In *Besant v. Wood* (b) the husband had covenanted in a separation deed to allow an infant child to reside with the wife, but had subsequently concurred, as next friend of the infant in a petition under the Infants' Custody Act (c) for the removal of the infant from the wife's custody, which had been ordered by the Court; and it was held by *Jessel, M.R.*, that this was not a breach of the husband's covenant.

In *Gandy v. G.* (d) there was a separation deed, by which, *inter alia*, the wife agreed to take 250*l.* per annum for the support of herself and family, and not to commence or prosecute any suit to compel her husband to allow her more. The husband committed adultery and cruelty. The wife instituted a suit for *judicial separation*, obtained a decree, and applied for an increase of alimony contrary to the covenant. The husband set up the deed, and the *C. A.* held that the fact of adultery subsequent to the deed was not sufficient misconduct to deprive him of the benefit of the covenant, and that as the Court could not rectify the deed after a decree for separation, as it could have done after a dissolution (e), the deed was binding (f).

In *Rose v. R.* (g) a wife contracted with her husband that she would not in any suit enter into his conduct before the execution of the deed. She filed a petition for adultery and cruelty committed both before and after the deed. At the hearing the adultery was admitted, and the Court held that no cruelty had been committed since the deed. The Court granted a *judicial separation* founded on the adultery since the deed, but refused a dissolution, as the cruelty before the deed could not be gone into.

In *Newsome v. N.* (h) a wife, for valuable consideration, agreed not to take proceedings against her husband on account of his incestuous adultery, "provided he remained true to her in love and duty." Upon his subsequently committing adultery, it was held that the agreement, by the terms of it, was no longer binding, and that she might proceed against him on the ground of the incestuous adultery.

(a) Cf. *Gandy v. G.*, 7 P. D., p. 80, and on appeal, p. 168.

(b) 12 C. D. 605.

(c) 36 Vict. c. 12.

(d) 7 P. D. 77, 168, C. A.

(e) *Morrall v. M.*, 6 P. D. 98; *Clifford v. C.*, 9 P. D. 76.

(f) Cf. *Besant v. Wood*, 12 C. D. 605; *Powell v. P.*, 3 P. & D. 36;

Benyon v. B., 1 P. & D. 447; *George v. G.*, 1 P. & D. 544.

(g) 7 P. D. 225; 8 P. D. 98, C. A.

(h) 2 P. & D. 306.

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Scilicet, that, in the absence of the proviso, he might have set up the agreement as a defence to the suit founded on the incestuous adultery before the agreement (a).

The discovery of misconduct not contemplated in the separation deed, committed by one of the principal parties to the deed previous to its execution, may prevent its being set up as a bar to proceedings in Court, contrary to a covenant therein contained. Thus, where there was a deed of separation, whereby a wife agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance, but subsequently having discovered that he had been guilty of incestuous adultery obtained a decree *for dissolution of the marriage*, it was held that notwithstanding the deed she was entitled to the usual order for permanent maintenance. "When," observed the President, "the wife has established that her husband has been guilty of incestuous adultery, a state of things arises not in contemplation when the deed was executed, the wife is not restrained by the deed. Circumstances now justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit, and amongst them to an allowance based on her husband's income (b).

Improper conduct, also, by one of the parties, *subsequent* to the execution of the separation deed, may prevent such party setting it up against the other. Thus, if, after the deed of separation has been executed and acted upon, the husband institutes a suit against the wife based on an unfounded charge, which compels her to make known in self-defence, her own grounds of complaint against him, the foundation of the arrangement between them is removed, and the consideration fails upon which it was entered into, and in such case the wife is remitted to her original position, and will be allowed, notwithstanding the provisions of the separation deed, to claim the fullest redress to which before its execution she was entitled (c).

In *Tress v. T.* (d) a wife covenanted in a separation deed that she would not take any steps to compel her husband to cohabit with her. The husband covenanted to pay her an annuity. This he paid for a short time and then made default. She sued for restitution of con-

(a) See *Rowley v. R.*, 1 L. R. 14 Q. B. D. 792, C. A.
11. L. Sc. 63; *Morrall v. M.*, *infra*.

(b) *Morrall v. M.*, 6 P. D. 98; compare *Newsome v. N.*, *supra*, 605; *Gandy v. G.*, 7 P. D., p. 175, C. A., *supra*, p. 605; *Fearon v. Aylesford*,

(c) See *Brown v. B.*, 3 P. & D. 202;

compare *Gooch v. G.*, (1893) P. 99, *supra*, p. 604.

(d) 12 P. D. 128.

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jugal rights. He did not appear. Held, the covenant of the wife was, under the circumstances, no bar. In *Moore v. M.* (a) the parties separated under a deed which contained no covenant not to sue. The husband petitioned for divorce on the ground of adultery, which failed, and the wife in her answer asked for separation; the husband did not set up the deed, and a decree for judicial separation was made.

Where a deed of separation does in fact give a licence to commit adultery, it amounts to connivance, and would be a complete bar to the suit (b).

Where a husband, by a separation deed to which he, the trustees, and his wife, were the only parties, covenanted to pay the trustees an annual sum for the use of his wife, and for the expenses of maintaining and educating his daughters, it was held by the C. A. that neither of the daughters by her next friend, without the trustees, could bring an action to enforce the covenant; but leave to amend was given, and upon the trustees refusing to be joined and to sue the husband, the Court held the wife might do so (c).

"*Dum casta*" Clause.—In *Gandy v. G.* (d) it was held, that a deed of separation must be construed as an agreement, amongst other things, that the parties shall live apart in chastity, and that the subsequent adultery of the husband deprived him of the right to have the restraining provisions of the deed enforced. But it was held by the C. A. that this is not so unless the misconduct is so gross, so entirely different from that which the parties were providing for when they entered into the deed, as to entitle one of them to disregard the bargain (e). So a covenant by the husband in a separation deed to pay his wife an annuity, without restricting his liability to such a time as she shall be chaste, is good, and continues in force although the wife afterwards commits adultery (f). So where an agreement to separate provided for the execution of a deed of separation which was to contain the "usual covenants," *Kay, J.*, held that these words did not include the "*dum casta*" clause (g).

(a) 12 P. D. 194.

(b) *Thomas v. T.*, 2 Sw. & Tr. 113; *Gandy v. G.*, 7 P. D. 168.

(c) *Gandy v. G.*, 30 C. D. 57.

(d) 7 P. D. 77.

(e) See judgment of *Cotton, L.J.*, in *Gandy v. G.*, 7 P. D., pp. 174, 175.

(f) See judgment of *Brett, M.R.*, in *Fearon v. Aylesford*, 14 Q. B. D., p. 799; and of *Cotton, L.J.*, p. 508; *Sweet v. S.*, (1895) 1 Q. B. 12.

(g) *Hart v. H.*, 18 C. D., pp. 692—697; *Bradley v. B.*, 51 L. J. P. & M. 87.

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4. Other Points connected with Separation Agreements, &c.

Debts arising on voluntary bonds or covenants are provable in bankruptcy, and will be paid, *pari passu* (a).

Cohabitation and reconciliation put an end to separation deeds, and all the effects of separation (b); provided that on the true construction of the deed it appears that its provisions were only intended to take effect as long as separation lasted (c).

Where a separation deed is made in anticipation of a separation which never takes place, the consideration having failed, the deed is wholly void, and the Court will not treat it as a voluntary deed, but will direct it to be cancelled (d). But if the deed contains provisions beyond the purview of a mere separation deed, it may be supported (e).

But mere reconciliation, such as communication by letters, without cohabitation (f), or merely living together under the same roof, without reconciliation, as where it is shown that the parties conducted themselves with the greatest animosity towards each other, will not have the effect of putting an end to the deed (g).

There is nothing illegal in continuing trusts for payment of money to the wife in the event of reconciliation (h).

And if a husband after a separation contracts to continue the payment of an annuity to his wife to which she was entitled under a separation deed, in case she would return to and cohabit with him, he will be bound to pay it, even where the contract was merely by parol, when the wife by part performance on her side takes the contract out of the statute (i).

The adultery of the wife will not prevent her taking proceedings

(a) See Bankruptcy Act, 1883, ss. 37, 40 (4), and *Re Stewart*, 8 C. D. 621; *Re Batey*, 14 C. D. 579. Cf. *Linton v. L.*, 15 Q. B. D. 239. And as to claims of creditors against a voluntary separation deed, see *Fitzer v. F.*, 2 Atk. 511; *Clough v. Lambert*, 10 Si. 174; as to purchasers, *Court v. Foster*, 1 John. & H. 30; as to valuable consideration, see note "Consideration," *supra*, p. 602.

(b) *Bateman v. Countess of Ross*; *Westmeath v. Salisbury*, 5 Bli. N. S. 339.

(c) See judgment of *Bowen, L.J.*, in *Nicol v. N.*, 31 C. D., p. 529. Cf. *Haddon v. H.*; *Ruffles v. Alston*, 19

Eq. 539.

(d) *Bindley v. Moloney*, 7 Eq. 343; see also *Westmeath v. Salisbury*, 5 Bli. N. S. 339.

(e) *Ruffles v. Alston*, 19 Eq. 539; *Nicol v. N.*, 31 C. D., p. 529.

(f) *Slatter v. S.*, 1 Y. & C. Exch. Ca. 28; *Frampton v. F.*, 4 B. 287.

(g) *Bateman v. Ross*, 1 Dow, 245.

(h) *Nicholls v. Danvers*, 2 Vern. 671; *Wilson v. Muschell*, 3 B. & Ad. 743; *Bateman v. Ross*, 1 Dow, 245; *Byrne v. Carew*, 13 Ir. Eq. R. 1; *Crouch v. Waller*, 4 De G. & J. 302; *Randle v. Gould*, 8 El. & Bl. 457.

(i) *Webster v. W.*, 4 De G. M. & G. 437.

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under the deed or contract for separation (*a*). The husband is liable under his covenants whether he commits adultery or not, and he would be so liable even if the wife had committed adultery (*b*). And a plea of the wife's adultery (*c*), of a divorce *à mensâ et thoro* (*d*), or a dissolution of marriage (*e*) on account of adultery, will be held no defence to an action by trustees for arrears of separate maintenance under a covenant in a separation deed (*f*), unless the covenant by unmistakable words limits his liability to the period during which the marriage relation continues (*g*).

Dissolution of Marriage.—In the case of *dissolution* of marriage, the Court has conferred upon it the right to vary both ante-nuptial settlements and post-nuptial settlements, including deeds of separation, and to deal with them in any way which may be thought just and expedient (*h*). And in such cases the Court has an absolute discretion as to the amount of the allowance to be made to the parties respectively under all the circumstances, and having regard to the conduct of the parties respectively. In *Clifford v. C.* (*i*) the husband, by a separation deed covenanted to pay 52*l.* per annum to a trustee for the benefit of the wife. She committed adultery and the marriage was dissolved. The husband did not pay the annuity, being under the impression that the dissolution put an end to the deed. The wife became chargeable to the parish, and a question arose with the guardians. The husband applied to vary or set aside the deed. *Brett, J.*, refused to vary the deed, treating the case as one of alimony. The *C. A.*, having regard to the conduct of the wife, especially in making charges against the husband in the suit for dissolution which she did not attempt to support, reduced the allowance to one-half (*k*).

And the Court has exercised this right where, in consequence of gross misconduct of the husband, discovered after the execution of a separation deed, the wife has subsequently obtained a dissolution of

(*a*) *Seagrave v. S.*, 13 V. 443, 9 R. R. 203; *Fearon v. Aylesford*, 14 Q. B. D. 792.

(*b*) *Gandy v. G.*, pp. 171, 172.

(*c*) *Baynon v. Batley*, 8 Bing. 256.

(*d*) *Joe v. Thurlow*, 2 B. & C. 547.

(*e*) *Goslin v. Clark*, 12 C. B. (N. S.) 681; *Clifford v. C.*, 9 P. D. 76, *infra*.

(*f*) See *Charlesworth v. Holt*, 9 Exch. 38.

(*g*) *Ib.* 41, per *Bramwell, B.*

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(*h*) See 22 & 23 Vict. c. 61, s. 5; 41 Vict. c. 19, s. 3.

(*i*) 9 P. D. 76, *C. A.*

(*k*) See *Boynton v. B.*, 2 Sw. & Tr. 275; *Gladstone v. G.*, 1 P. D. 442; *Mandslay v. M.*, 2 P. D. 256; *Wigney v. W.*, 7 P. D. 177; *Robertson v. R.*, 8 P. D. 94; *Jump v. J.*, 8 P. D. 159; *Ponsonby v. P.*, 9 P. D. 58; *Noel v. N.*, 10 P. D. 179.

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the marriage (*a*). There a wife, by a deed of separation, agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance. Subsequently, having discovered that he had been guilty of incestuous adultery, she obtained a decree for the dissolution of the marriage. It was held that, notwithstanding the deed, she was entitled to the usual order for permanent maintenance (*b*).

Judicial Separation.—But in the case of *judicial separation* (*c*), there being no such power, any deed executed remains binding. In *Gandy v. G.* (*d*) a husband committed adultery, and disputes arose between him and his wife, which led to his committing acts of legal cruelty. A separation deed was then executed, by which he agreed to allow her 250*l.* a year, and to maintain the two youngest children, who were not to be in her custody; and she covenanted not to take any proceedings to compel her husband to allow her a larger amount of alimony. Subsequently the husband again committed adultery, and the wife obtained a decree for judicial separation and an order that she should have the custody of the two youngest children. The husband had, since the date of the separation deed, become wealthy, and the wife applied for an inquiry as to his means with the view of obtaining increased alimony. It was held by the C. A., that increased alimony could not be ordered, for since the Court had not, as in the case of a decree for dissolution of marriage, power to alter the separation deed, the covenant by the wife not to sue for increased alimony was binding on her, and must have effect given to it, the husband not having been guilty of such misconduct as under the circumstances of the case would disentitle him to claim the benefit of the deed (*e*).

But the wife would not be bound by the provisions of such a separation deed, if, although she had trustees, she had not herself unequivocally asserted her rights under it (*f*). But if there is an agreement by her, of which a recital in the deed may furnish evidence, and she has accepted benefits thereunder, then she will be bound, although she herself has not covenanted, but only her trustee (*g*).

(*a*) See *Morrall v. M.*, 6 P. D. 98.

(*b*) See *Jump v. J.*, 8 P. D. 159; *Clifford v. C.*, 9 P. D. 76.

(*c*) As to which, see *Divorce and Matrimonial Causes Act* (20 & 21 Vict. c. 85); 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 29 & 30 Vict. c. 32; 41

Vict. c. 19; and the *Matrimonial Causes Act*, 1884 (47 & 48 Vict. c. 68).

(*d*) 7 P. D. 182.

(*e*) See *Morrall v. M.*, *supra*.

(*f*) *Williams v. Baily*, 2 Eq. 731.

(*g*) *Clark v. C.*, 10 P. D., p. 195.

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The existence of a separation deed, none of the provisions of which had been acted upon, was held to be no ground for refusing relief to the wife on account of the desertion of the husband some time after the execution of the deed (*a*).

After a separation by private arrangement of the parties, a husband and wife still retain their relative positions which formerly could only be dissolved by Parliament (*b*), and now by proceedings under the Divorce and Matrimonial Causes Act (*c*); the husband will, consequently, be liable to his wife's debts, unless he provides for her maintenance by an adequate allowance, and it is regularly paid; in which case, he will have a good defence to an action brought against him for goods supplied to his wife (*d*).

An ordinary deed of separation does not amount to a licence to commit future adultery (*e*). Hence, it was no bar to an action for damages by the husband for the seduction of his wife (*f*); nor will it, in the absence of express stipulation to that effect, prevent a wife from claiming her share of her husband's personal estate under the Statute of Distributions (*g*).

5. Contracts for Future Separation.

All agreements providing for future separation are void, as contrary to public policy (*h*). However, in *Rodney v. Chambers* (*i*), a covenant to allow maintenance in case the separation took place with the *approbation of trustees*, was held valid (*k*).

And a separation deed providing for immediate separation may, if

(*a*) *Cock v. C.*, 13 W. R. 188.

(*b*) *Marshall v. Rutter*, 8 T. R. 545.

(*c*) 20 & 21 Vict. c. 85.

(*d*) *Hodkinson v. Fletcher*, 4 Camp. 70; *Hindley v. Westmeath*, 6 B. & C. 200; *Mizen v. Pick*, 3 M. & W. 481; *Reeve v. Conyngham*, 2 C. & K. 444.

(*e*) *Sullivan v. S.*, 2 Adams, 299, at p. 303.

(*f*) *Chambers v. Caulfield*, 6 East, 244.

(*g*) *Slatter v. S.*, 1 Y. & C. Exch. Ca. 28.

(*h*) *Westmeath v. W.*, 1 Dow & Cl. 519; *Westmeath v. Salisbury*, 5 Bli.

(N. S.) 339; and see *Durant v. Titley*, 7 Price, 577; *Vandergucht v. De Blaquiore*, 5 My. & C. 229, and *s. Cocksedge v. C.*, 5 Ha. 397; *Cartwright v. C.*, 3 De G. M. & G. 982; *Byrne v. Carew*, 13 Ir. Eq. R. 1; *H. v. W.*, 3 Kay & J. 382; *Merryweather v. Jones*, 4 Gif. 499; *Procter v. Robinson*, 14 W. R. 381.

(*i*) 2 East, 297.

(*k*) And see *Gawden v. Draper*, 2 Vent. 217; *Chambers v. Caulfield*, 6 East, 244; *Soilleux v. Herbst*, 2 Bos. & Pul. 444; *Bateman v. Ross*, 1 Dow. 235.

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not acted upon, be held void (*a*) if it is not something more than a mere separation deed (*b*).

In *Re Moore* (*c*), testator directed his trustees to pay to his sister during such time as she may live apart from her husband, before his son attained twenty-one, the sum of 2*l.* 10*s.* per week. The sister was then living, and until after the testator's death was living with her husband, but subsequently they separated. Held, the object of the gift was to promote separation, and therefore void.

(*a*) *Westmeath v. Salisbury*, *supra* ; *supra*, p. 608.

Bindley v. Mulloney, 7 Eq. 343.

(*c*) 39 C. D. 116.

(*b*) *Ruffles v. Alston* ; *Nicol v. N.*,

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1789. 1 V. jun. 22; 1 R. R. 76.

Fraud on Marital Rights.

A woman, pending a treaty of marriage with A., settled all her property to her separate use, with his approbation; a few days after, B., by stratagem, induced her to marry him, the day after she first thought of it: B. had no notice of the settlement. The settlement was established, and a deed of revocation obtained by duress set aside.

The burthens, to which a husband is liable, are a consideration for his marital rights, upon which, therefore, fraud may be committed.

Conveyance by a woman under any circumstances, and even the moment before marriage, is good, *prima facie*: is bad only if fraudulent, as where it is made pending the treaty, without notice to the intended husband.

LADY STRATHMORE, being seised and possessed of great property, both real and personal, pending a treaty of marriage with Mr. Grey, conveyed all her real, and assigned all her personal, estate to trustees for her sole and separate use, notwithstanding any future coverture. This settlement was prepared with the approbation of Grey. A few days after the execution, hearing that Mr. Bowes had fought a duel on her account with the editor of a newspaper, who had traduced her character, she determined to marry him, and the marriage took place the next day. Bowes had not notice of the settlement. There were two bills: an original bill by Lady Strathmore, to set aside a deed revoking the settlement, as having been obtained by duress: and a cross bill by Mr. Bowes, to set aside the settlement, as against the rights of marriage, and a fraud upon him, and to establish the deed of revocation. An issue was directed, to try whether the deed of revocation had been obtained by duress, and the verdict in the Common Pleas was against the deed. The

(a) S. C., on the first hearing, 2 on appeal, 6 Bro. P. C. 427, Toml. Bro. Ch. 345; 2 Cox, 28, affirmed, edit.

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cause coming on upon the equity reserved, Mr. Justice *Buller*, sitting for the Lord Chancellor, decreed in favour of Lady Strathmore, and dismissed the cross bill with costs. It came on again, upon the petition of Mr. Bowes, for a rehearing, and reversal of that decree so far as it dismissed the cross bill.

Mr. *Richards*, for Mr. Bowes.—The question is whether this settlement, made before marriage, is valid or not, as being in derogation of the common rights of marriage. A wife, by the marriage contract, becomes extinct, from the nature of it, for several civil purposes with regard to which she merges in the husband. He becomes liable to all her debts, and answerable for all her acts that do not amount to felony: and even for that, if committed in his presence; because her mind is supposed to be under his coercion. In order to enable him to answer this, he has by the law all her property. It is absurd to say, the wife shall by her own act deprive the husband of what the law has given him. * * *

Mr. *Mansfield*, Mr. *Hardinge*, Mr. *Law*, and Mr. *King*, for Lady Strathmore.—Lady Strathmore is in possession by a deed to trustees, giving her own property to her use. It was done in contemplation of marriage with another person: therefore not fraudulent as to Mr. Bowes, unless any deed by a *feme sole*, by which she disposes of her property, shall be construed to be fraudulent if not communicated to any future husband. Want of communication is the only circumstance that can be alleged; but that is very different from concealment, for which there can be no pretence here. * * * It is enough for us to say, Mr. Bowes was not cheated.

LORD CHANCELLOR THURLOW.—The mere question seems to be, what is the true foundation for setting aside an instrument *prima facie* good? Can less be imputed to it than fraud? Or can it be void upon the notion of general policy, as has been urged for Mr. Bowes? If not, must not fraud be imputed? and, if so, will the circumstances of its being made in contemplation of marriage affect it with fraud? Suppose a relation had given 10,000*l.* for her sole and separate use; if she had represented it as her own absolutely, so that, upon a marriage, it would have gone to her husband, this Court would have

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compelled the trustees to give it to the husband, but not otherwise (a); nor is there any difference between a fortune so circumstanced by an act of her own, or of the donor. Consider what will be the effect of this void deed of revocation? If he had joined with her to revoke that settlement and appoint new uses, he could not have rescinded that afterwards; because he had affirmed the deed by acting upon it. If he had acted honestly upon it, as in the case I have put, he could not have set that aside; his counsel are to show that he may, because he has acted dishonestly upon it, which at present I think rather a vain attempt.

I never had a doubt about this case. If it is to be considered upon the ground of its being against a rule of judicial policy, the arguments for Mr. Bowes would have had great weight. The law conveys the marital rights to the husband, because it charges him with all the burthens, which are the consideration he pays for them: therefore, it is a right upon which fraud may be committed. Out of this right arises a rule of law that the husband shall not be cheated on account of his consideration.

A case of this kind came before me a few days ago (b). A woman adult, about to marry an infant, made a settlement, in contemplation of that marriage, in which he joined, though an infant, for the purpose of expressing his consent. As it was upon fair consideration, and no fraud to draw him in as an infant, I thought the circumstance of its being fair would bind him, though, as an infant, not capable of consenting; according to which I held the settlement good, as she was capable of conveying; and as it was a public and open transaction, with the consent of the family, and consequently no fraud, though his being privy to it would not have concluded him from any rights as being an infant.

A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is prima facie good, and becomes bad only upon the imputation of fraud. If a woman, during the course of a treaty of marriage with her, makes without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good prima facie, because affected with that fraud.

(a) See *Ashton v. M'Dougall*, 5 B. 66.

(b) *Slocombe v. Glubb*, 2 Bro. Ch. 545.

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As to the morality of the transaction, I shall say nothing to that. They seem to have been pretty well matched. Marriage in general seems to have been Lady Strathmore's object: she was disposed to marry anybody, but not to part with her fortune. This settlement is to be considered as the effect of a lucid interval, and if there can be reason in madness, by doing this she discovered a spark of understanding.

The question which arises upon all the cases is, whether the evidence is sufficient to raise fraud. Even if there had been a fraud upon Grey, I would not have permitted Bowes to come here to complain of it. But there was no fraud, even upon Grey, for it was with his consent: and so I cannot distinguish it from a good limitation to her separate use. Being about to marry Grey, she made this settlement with his knowledge; and the imputation of fraud is, that having suddenly changed her mind and married Mr. Bowes, in the hurry of that improvident transaction she did not communicate it to him; but there was no time, and could be no fraud, which consists of a number of circumstances. It is impossible for a man marrying in the manner Bowes did, to come into equity and talk of fraud. Therefore, the decree must be affirmed, with costs; but let him have all just allowances as to what he paid when in receipt of the profits, and as to the annuities, which are declared not to be disturbed by the decree.

NOTES.

The doctrine of fraud on marital rights has, having regard to the Married Women's Property Act, 1882, lost much of its importance. Mr. Vaizey, in his work on Settlements, says (a): "In the old sense, therefore, of the husband being deprived of something to which, as a husband, he would have a right, if the wife had not before marriage executed a conveyance, fraud on marital right does not appear to be any longer possible, . . . but the necessity of the most abundant good faith in such a contract as that of a settlement made on a marriage is so obvious and cogent that it would be rash to conclude that the Act has wholly deprived of effect the doctrine here considered."

The rule upon which the Courts acted in setting aside a settlement

(a) Vaizey, *Settlements*, pp. 1581, 1585, 1586.

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made by a woman of her own property previous to marriage, *in violation or fraud of the marital rights of her intended husband*, is well laid down by Lord *Thurlow*. "A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *prima facie* good, and becomes bad only upon the *imputation of fraud*. If a woman, *during the course of a treaty of marriage* with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *prima facie*, because affected with that fraud."

The concurrence of two circumstances, pendency of a marriage treaty and ignorance on the part of the intended husband, ordinarily sufficed to invalidate a settlement, but fraud will depend on the particular circumstances of each case (*a*).

The actual decision, however, does not come within this principle; for it will be observed, the settlement was made by Lady Strathmore with the consent of Grey, her then intended husband, and not during the course of a treaty of marriage with Bowes, whom she afterwards married, and it was, therefore, not a fraud upon him. It was necessary, therefore, for a person impeaching a settlement on the ground of this species of fraud, to prove that, at the time of its execution, he was *the then intended husband*, otherwise it would not be set aside (*b*), and the husband only and not his representatives could complain (*c*).

It is clearly settled, that if a woman, during a treaty for marriage, held herself out to her intended husband as entitled to property, which will become his upon the marriage, and then makes a settlement of it without his knowledge or concurrence, actual fraud would be imputed to her, and the settlement would be set aside in a Court of equity (*d*). It was observed by *Buller, J.*, that "Fraud consists in falsely holding out that a woman has an estate unfettered, and that the husband will be of course entitled to it. No case has yet established, that all conveyances by a wife before marriage are void merely because not communicated to the husband." And again, "It is necessary to show other facts, and that the husband is actually deceived and misled; and the bare concealment is not sufficient (*e*)."
These dicta, however, can scarcely be supported,

(*a*) See *Vaizey, Settlements*, vol. ii., p. 1583.

(*b*) *England v. Downs*, 2 B. 522; *Ball v. Montgomery*, 2 V. 194, 2 R. R. 197.

(*c*) *Vaizey, Settlements*, vol. ii., p.

1583; *Grazebrook v. Percival*, 14 Jur. 1103.

(*d*) *England v. Downs*, *supra*; see also *Howard v. Hooker*, 2 Ch. R. 81, *Carleton v. Dorset*, 2 Cox, 33.

(*e*) 2 Cox, 29, 30.

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although there have been some cases in which, under peculiar circumstances, it has been held that a *bare concealment* by a woman from her intended husband, of a gift or a settlement of part of her property made during the treaty for a marriage, was *not* sufficient evidence of fraud, so as to render the settlement void as against the husband (*a*).

However, in *Goddard v. Snow* (*b*), a woman ten months before marriage, but *after the commencement of* that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money which he did not know her to be possessed of. The marriage took place, she concealing from him both her right to the money and the existence of the settlement. Ten years afterwards she died, and after her death the husband filed a bill to have the money paid to him. It was argued, on behalf of the defendants, that, as the husband did not know of the existence of the sum of money, and was therefore not induced to contract the marriage on the notion that it would be subject to his marital rights, no fraud, such as the authorities held to be necessary, had been committed; that there was, at the utmost, only concealment, and that concealment alone was not sufficient to avoid a settlement confessedly valid at law. *Gifford, M.R.*, however, held that the settlement was void against the husband, as a fraud upon his marital rights (*c*).

It has been supposed that a settlement by a widow upon her children by a former marriage, even if made during the treaty for a second marriage, without the knowledge of her intended husband, is valid, because the object of the settlement, it has been said, is meritorious. *Hunt v. Matthews* (*d*), and *King v. Cotton* (*e*), have been cited as supporting the proposition: it appears, however, by an extract from the decree in Raithby's edition of Vernon, that the husband, in *Hunt v. Matthews*, consented to the settlement being made by his intended wife upon her children by a former marriage; and in *King v. Cotton*, the settlement was made by Lady Cotton upon the children of a former marriage, *previous to her entering upon a treaty for a second marriage*. And see *England v. Dornus*, *supra*.

(*a*) See *Thomas v. Williams*, Mos. 177.

(*b*) 1 Russ. 485.

(*c*) See *St. George v. Wake*, 1 My. & K. 622, where Lord Brougham says, that the principle was carried further in *Goddard v. Snow* than in any other

case; see also *Downes v. Jennings*, 32 B. 290; *Prideaux v. Lonsdale*, 1 De G. J. & S. 433; *Chambers v. Crabbe*, 34 B. 457.

(*d*) 1 Vern. 408.

(*e*) 2 P. W. 674.

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The fact that the husband was ignorant that his wife had any property, or that she has practised no actual deception upon him, would not, it seems, be sufficient to prevent the Court from setting aside a settlement made in fraud of the marital right. See *Taylor v. Pugh* (a), in which case, however, *Wigram*, V.-C., decided against the husband upon other grounds.

But a gift or settlement, by a woman, of her property, during the treaty for marriage, would not be set aside, if the husband knew of the gift or settlement before the marriage (b), even though the husband be a minor (c).

The seduction by a man of his intended wife might be a reason why the Court should not set aside a settlement made by her before marriage. Thus, in *Taylor v. Pugh* (d), where a man had induced his intended wife to cohabit with him previously to marriage, *Wigram*, V.-C., refused to set aside a settlement of her property, although executed without his knowledge, during the treaty for the marriage, because her husband, before the marriage, had put it out of the power of the wife effectually to make any stipulation for the settlement of her property, by his conduct towards her (e).

The concurrence of the husband in making a settlement would preclude him from taking any objections to it; but not, it seems, if he be a minor (f). The case of *Slocumbe v. Glubb*, reported in 2 Bro. Ch. 545, and referred to in the principal case, was, according to *Selborne*, C., decided against the husband, who had concurred in the settlement while a minor upon the ground "that as he had taken a benefit under the settlement, he could not reject it in part and accept it in part (g). As to settlements made under the Infants Settlements Act (h), see note to *Eyre v. Countess of Shaftsbury*, ante (i).

In a case in 1863, a settlement made by a woman of her personal property after her engagement to be married, was set aside at the suit of the husband, although he was told before the marriage that she had executed a settlement affecting her property, it appearing

(a) 1 Ha. 608.

(b) *St. George v. Wake*, 1 My. & K. 610; *Ashton v. M'Dougall*, 5 B. 56; *Griggs v. Staplee*, 2 De G. & Sm. 472.

(c) *Slocumbe v. Glubb*, 2 Bro. Ch. 645; *Wrigley v. Swainson*, 3 De G. & Sm. 458.

(d) 1 Ha. 608.

(e) But see *Downes v. Jennings*, 32 B. 290.

(f) *Nelson v. Stocker*, 4 De G. & J. 458.

(g) *Kingsman v. K.*, 6 Q. B. D., p. 125.

(h) 18 & 19 Vict. c. 43.

(i) *Shelford*, R. P. S. (1893). p. 312.

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that neither she nor her husband was accurately informed of the nature and effect of the trusts of the settlement (a).

If a husband acquiesced in, or confirmed, a settlement, he would not afterwards be allowed to dispute it (b).

But in *Dowdes v. Jennings* (c), it was held that delay in instituting a suit for two and a half years after the discovery by the husband of the settlement did not operate as a bar.

If a woman gave a security to a *volunteer*, prior to marriage, without the consent of the intended husband, it might be set aside by him (d).

But where a woman, about to marry, gave a bond for *valuable consideration*, although without her intended husband's knowledge, it was held that the husband could not be relieved against it. But concealment of such securities or debts is not to be encouraged (e).

Fraud on Intended Wife.—It has been stated that a conveyance in trust privately made by the husband on the eve of marriage, for the purpose of barring dower, would be decreed fraudulent, as being designed to deprive the wife of the provision given her by the common law (f). But Mr. Vaizey points out that this equity, as regards the husband, rests upon the peculiar right which a man had in his wife's property, and that a wife has no similar equity (g).

For a decree setting aside a settlement as a fraud on marital rights, and declaring the trusts of a new settlement, see *Seton* (1893), p. 1951.

(a) *Prideaux v. Lonsdale*, 4 Gif. 159; 376.
1 De G. J. & S. 433.

(b) *St. George v. Wake*, 1 My. & K. 610; *Maber v. Hobbs*, 2 Y. & C. Ex. Ca. 317, 2 B. 535.

(c) 32 B. 290, 523.

(d) *Lance v. Norman*, 2 Ch. R. 79.

(e) *Blanchet v. Foster*, 2 V. 264; *Llewellyn v. Cobbold*, 1 Sm. & G.

(f) *Lex Prot.* 267; 1 Bright, H. & W. 356; and see *Drury v. D.*, *Wilmot's Opinions*, 177; 4 Bro. Ch. 506, n. (v).

(g) *Vaizey, Settlements*, vol. ii., p. 1587; and see *Swannock v. Lyford*, Co. Litt. 108, n. 1; *Banks v. Sutton*, 2 P. W. 700; 1 Bright, H. & W. 357; *McKeogh v. M.*, Ir. R. 4 Eq. 346.

ELIBANK *v.* MONTOLIEU.

1799, 1801. 5 V. 737; 5 R. R. 151.

Wife's Equity to a Settlement.

Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the plaintiff's husband to him, it was declared he was not entitled to retain: but that the plaintiff's share was subject to a further provision in favour of her and her children, the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children, regard being had to the extent of her fortune and the settlement already made upon her.

IN 1795, Lady Cranstown died intestate, possessed of large personal property, leaving two brothers and two sisters her next of kin. Lewis Montolieu, one of her brothers, took out letters of administration to her.

The bill was filed by Lady Elibank, one of the sisters, against her husband Lord Elibank, and against Montolieu, *praying an account of the plaintiff's share, and that it may be settled on her and her family.*

The defendant Montolieu, by his answer, claimed to retain Lady Elibank's share towards satisfaction of the debt due to him from Lord Elibank by two bonds—one dated the 31st of May, 1783, for 12,217*l.* 9*s.* 9*d.*; the other, dated the 14th November, 1794, for 1,000*l.*—upon the ground of the *provision made for the plaintiff by the settlement previous to her marriage with the defendant Lord Elibank, in 1776.* By that settlement, the sums of 12,000*l.* and 5,000*l.* New South Sea Annuities were settled in trust for Lord Elibank for life; and after his decease, for Lady Elibank for life as a jointure, and in lieu of dower or thirds; and after the decease of both, in trust for the children. The sum of 4,000*l.* New South Sea

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Annuities was settled in trust for her separate use for life ; and after her death, for her children ; and 2,000*l.* 5*l.* per cent. Bank Annuities for her separate use for life ; and after her death, for her children, as she should by will appoint. All these sums were her property before marriage. The settlement also gave her some contingent interests.

In the entail of Lord Elibank's estate, a power was reserved to charge 200*l.* a year jointure, and 50*l.* a year to each of his younger children, not exceeding in the whole 200*l.* a year, under a condition, that the estate should be chargeable with only one jointure at a time ; and that, if the power of charging for children had been exercised by a preceding heir in tail, the heir in possession should not charge for his younger children. The defendant Lord Elibank, by his answer, stated that a former Lord Elibank did charge to the full extent of that power.

The *Solicitor-General*, Mr. Grant, and Mr. Alexander, for the plaintiff.—The plaintiff desires an account of the personal estate of Lady Cranstown, and that a provision may be made for her. The defendant Montolieu insists that is not to be done, because he is a creditor of her husband ; contending that this case is out of the usual rule upon which the Court acts for a wife ; and that there is no necessity to come to this Court, the fortune not being in Court nor under the control of the Court. * * * But suppose the husband could sue at law, this defendant could not make this defence, that he will not pay, but will keep this fund in satisfaction of the husband's debt to him ; for it is clear, at law, a creditor of the husband cannot set off the husband's debt against the demand of the husband and wife, and being entitled in her right he must sue with her. Still less should he be permitted to retain in equity upon that ground ; for, where he is permitted to avail himself of the legal right, the right must be clear. * * *

The *Attorney-General*, Mr. Mansfield, and Mr. W. Agar, for the defendant Montolieu. —The objection to the form of the suit would merely occasion delay ; and a bill would be filed in their joint names.

There is no case in which the Court has decreed against a trustee who had paid the husband without suit that the wife had an equity to charge the trustee. * * * All the instances are, where the

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person has refused to pay, unless compelled by a Court of equity. That gives the jurisdiction; and none can be produced, where the executor has been prevented from paying to the husband, if he chose to do so; or where, having paid to the husband, he has been charged as upon a breach of duty by reason of that payment, and made to refund.

This case is certainly new, in the circumstances that the husband is debtor to the other defendant; but if he could have paid the husband, and the Court would not have made him refund, there can be no difference from his retaining against the husband. Suppose Lord Elibank had sued, and the equity of the wife, having a very large provision, was out of the question, this Court would never compel the administrator to pay that share to his debtor, unless the latter would allow the debt. This Court goes infinitely beyond Courts of law, as to set-off. It would be strange to permit the wife to intervene against the administrator retaining, where she could not intervene to prevent his paying her husband, and the husband paying his debt out of that. * * * There is no instance of a bill, by the wife against her husband, to have the property settled to her separate use; which is the object of this bill. This property, though subject to the equity of the wife, is the property of the husband.

The *Solicitor-General*, in reply.—The rule is clear, that, wherever the husband becomes entitled to sue in right of his wife, she must consent that he shall have it, or he is under the necessity of making a settlement, unless the Master is of opinion that the settlement already made by the husband is such as to answer all the purposes of the wife. * * *

LORD CHANCELLOR LOUGHBOROUGH (a).—I wish to consider this case.

Feb. 19th, 1801.

LORD CHANCELLOR LOUGHBOROUGH.—The only difficulty I had in this cause was upon the form of the suit; whether a married woman by her next friend could be the plaintiff in this Court.

With respect to the point made by the answer of Montolieu, that

(a) Afterwards Earl of Rosslyn.

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he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am very clearly of opinion the defendant had no right to retain. The administrator is trustee for the next of kin: the plaintiff being one of them, if she has any equity against her husband with regard to this money, that equity will clearly bar any right of retainer he can set up to the property of which he became administrator.

With respect to the only difficulty I had upon the point of form, if she is entitled, and there is no way of asserting her right against the husband, except by a bill, that objection, I think, does not weigh much. If the defendant Montolieu had done what would have been the natural thing and the right thing, and what he certainly would have done but for his own interest, he would have been the plaintiff, desiring the Court to dispose of the fund, and for her benefit, to protect her interest in it. Then, upon all the circumstances, it is very clear, if it had come before the Court, it would have been matter of course to have pronounced upon her equity upon the bill of the administrator, praying that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank without making a provision for her, for the provision upon her marriage was clearly not adequate to her fortune; and it is clear that provision was made upon the expectation, that, by circumstances to occur in his family, there would be an opportunity to do better for her at a future period. The difficulty was, that it was very unusual in point of form—the bill coming on the part of the wife, instead of the husband.

Declare, that the defendant Montolieu is not entitled to retain, in satisfaction of the debt due from the defendant Lord Elibank to him, but that the distributive share of Lady Cranstown's fortune, accruing to the plaintiff, as one of her next of kin, is subject to a farther provision in favour of the plaintiff and her children, the settlement made upon her marriage being inadequate to the fortune she then possessed. Refer it to the Master to take the accounts, and to see a proper settlement made upon the plaintiff and her children, regard being had to the extent of her fortune and the settlement already made upon her.

MURRAY v. LORD ELIBANK.

1804. 10 V. 84 ; 7 R. R. 346.

Wife's Equity to a Settlement.

Children have a right to a provision out of the property of their mother, under a decree directing a settlement by the husband on her and her children, notwithstanding her death before the report, but the mother may waive her equity to a settlement, and so defeat the right of the children at any time before completion.

Previously to a bill a trustee for a *feme covert* may pay her personal property, or the rents and profits of her real estate, to her husband ; not after bill filed.

Demurrer to the bill of the children was overruled.

THE bill was filed by the infant children of Lord Elibank, stating the proceedings in the cause *Lady Elibank v. Montolieu*, and the decree, directing the Master to approve a proper settlement to be made by the defendant Lord Elibank on the plaintiff, Lady Elibank his wife, and her children by him, regard being had to the extent of her fortune and the settlement already made upon her by Lord Elibank.

The bill farther stated, that before any report Lady Elibank died intestate ; and prayed that it may be declared, that the plaintiffs and the defendant Alexander Murray, another child of Lord and Lady Elibank, have, under the decree of the 19th February, 1801, a right to have a provision made for them out of the said one-fourth of the personal estate of Lady Craustown : and that it may be referred to the Master to approve of a proper settlement to be made by the defendant Lord Elibank upon the plaintiffs and the defendant Alexander Murray, being all the children ; regard being had to the extent of the fortune of Lady Elibank, and the settlement already made by Lord Elibank.

To this bill the defendant Montolieu put in a demurrer.

Mr. Alexander and Mr. Cooke, in support of the bill.— * * *
Here is a decree, establishing this right of the children in the life of

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the wife, and the settlement is to be considered as made at the date of the decree, and in the nature of an agreement sanctioned by the Court, giving the husband the fortune upon terms. In *Martin v. Mitchell*, the case before Lord *Thurlow* in 1779, the Court, after the death of the wife before a settlement, carried the proposal into execution against an assignment to a creditor. They also cited *Rowe v. Jackson* (a) and *Hearle v. Greenbank* (b).

Mr. *Richards* and Mr. *W. Agor*, in support of the demurrer.—
 * * * In *Macaulay v. Phillips* (c), it was held, that the decree gave no interest to the husband, but it survived to the wife; and Lord *Alvanley* says, if she died, notwithstanding his proposal, he would have been entitled. * * *

LORD CHANCELLOR ELDON.—There are two points upon this demurrer; one of form, the other upon the merits. If the wife has this equity for a provision for herself and her children up to the moment of the completion, it is competent to her to give it to her husband. A great variety of proceedings have occurred, in which the Master has stated, that, with reference to the point of settlement, the party had waived it; and I apprehend, it will be found that she may, between the period of the order and her death, waive the benefit of that order (d). The question then is, if between the date of the order and her death, she does not, by some authoritative proceeding, express an alteration of her mind, whether that order is to stand for the benefit of the children. The two decisions that have been mentioned are strong authorities for that. Let an inquiry be made into the circumstances of those cases; and, as to the latter, whether the assignees of the husband were heard or not.

July 30th, 1804.

Mr. *Alexander*, for the plaintiffs, stated the case of *Martin v. Mitchell*, from the Register's book, in which the motion before Lord

(a) 2 Dick. 604.

(b) 3 Atk. 695.

(c) 4 V. 15.

(d) See *Lloyd v. Williams*, 1 Madd. 466.

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Thurlow, in 1779, was made. In 1777, a decree was made for an account, and that what should be found due to Hannah Fearn should be paid into Court, to her separate account, with the usual direction for a settlement. The sum of 3,000*l.* was, by the report, stated to be due, and was carried over. After her death, in 1779, the motion referred to in *Rowe v. Jackson*, to pay that sum to the husband, was made, and refused; and an order was made, directing the husband to go before the Master, and execute the order for a proposal. That proposal was carried into effect, by petition, at the Rolls; and, under another order, in 1803, stating all the proceedings, the children were paid. * * *

LORD CHANCELLOR ELDON.—The question is, what is the effect of such an order, as constituting a right in the issue to a provision, if the wife dies without any act done after the date of that order. If this case had been antecedent to the period when the manuscript case to which Mr. *Madocks* alluded was decided, it would have been very difficult, consistently with what the Court does with the wife's property, to say there was such a right as is now asserted, upon a proceeding that went no farther than an order to lay a proposal before the Master. The husband, where he can, is entitled to lay hold of his wife's property, and this Court will not interfere. Previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband. Lord *Altonley*, in *Maccublay v. Philips*, has laid down, that, after a bill filed, the trustee cannot exercise his discretion upon that; that the bill makes the Court the trustee, and takes away his right of dealing with the property, as he had it previously. I have heard that otherwise stated in this Court, at the bar, at least. But that case is the last; and I think contains very wholesome doctrine upon that point. I should have supposed, a decree made in the cause proceeded upon the right or equity in the wife at the filing of the bill; for decrees are only declarations of the Court upon the rights of the parties when they begin to sue. The wife is entitled to call for a declaration, that she then had a right to a provision for herself and her children; and yet it is clear, after such a bill filed, she might come into Court and consent to her husband's having the fund entirely under his dominion. If she does not, the

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Court, by the decree, orders a proposal to be made for a settlement upon the wife and issue.

It has been truly observed, that this doctrine is a mere creature of the Court, founded altogether in its practice. The case of *Macaulay v. Philips* proves, what I should have had no doubt upon, that notwithstanding that order for a proposal, if either party died while it rested merely in proposal, that would not affect the right by survivorship as between the husband and wife. There were no children in that case, certainly. It is not unfrequent, where the Master makes his report after a decree, for him to state, that the parties had declined to lay a proposal for a settlement before him. That has occurred since I have sat here; but, when at the bar, I was frequently concerned in this final arrangement, that, notwithstanding such order by the original decree, upon further directions the wife came consenting that the fund should be taken out of Court, and was permitted to do so. If, therefore, the issue have a right against the father, it is dependent altogether upon the will of the mother. There is, perhaps, some difficulty in making all the principles of the Court upon this subject consistent with the notion of such right in the children; but it is not for me to reconcile all these principles, if there is practice sufficient to establish a given course as to that. In *Rowe v. Jackson* (and I can, from my own memory, confirm both accounts of that case), upon an application, where it was necessary to consider whether, the wife never having expressed any change of opinion between the period of the order for a proposal and her death, that order gave the children any right, Mr. *Mudocks* stated, that it was not according to the practice, after that order, to permit the husband to avail himself of the death of the wife to take the fund, leaving the children unprovided. His authority, always considerable, is in that instance peculiarly to be regarded, as he referred to another case, in which Lord *Thurlow* was satisfied that such was the rule, and acted upon it. But it does not rest there; for in a subsequent case it is clear from the Register's books that Mr. *Mansfield*, after the death of the wife, moved that a sum of money should be paid to the husband; and Lord *Thurlow* refused that application, upon the ground that the order for a proposal on behalf of the children was an obstacle. That was followed by what Lord *Alvanley* did upon a petition; whether regularly or not, will not shake the doctrine, considering what had

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been done before. In that instance, Lord *Alvanley* would not deliver out that small sum, little more than 300*l.*, until satisfied that there was some provision for the children.

Taking all this together, however numerous the difficulties upon it, it is too much for me to say, upon the argument of a demurrer, all that has been done in the cases referred to is to go for nothing, because it is difficult to say, *ab ante*, it should be done, and that I am to set up a different course of practice. I agree also with Mr. *Alexander*, as to the dictum of Lord *Alvanley* in *Macculay v. Philips*, which construction is necessary to make him consistent; and attention being given to the circumstance that there were no children, there is no inconsistency in that case. The principle must be, that the wife obtained a judgment for the children, liable to be waived, if she thought proper; otherwise, to be left standing for their benefit at her death.

Next, as to the form: if the children have acquired a right by the judgment in the former suit, it is subsequent to the institution of the proceeding in that suit; and unless they can apply by petition, under the liberty to apply, I do not see how they can, except by supplemental bill.

The demurrer, therefore, ought to be overruled. If, upon the hearing of the cause, this should turn out to be wrong, it is infinitely better that it should go to the House of Lords upon a full hearing.

Demurrer overruled.

Subsequently in 1809, this cause came for hearing before *Grant*, M.R., and the plaintiffs were held clearly entitled. The case is reported in 13 V. p. 1, and 14 V. p. 496.

NOTES.

1. Generally.
2. Duty of trustee, p. 632.
3. Property subject to the equity, p. 632.
4. Rights of children, p. 637.
5. As to the amount to be settled, p. 639.
6. As to the settlement, p. 641.
7. Waiver of settlement, p. 644.
8. Where the equity is barred or does not arise, p. 649.
9. Against whom the equity is binding, p. 652.

1. Generally.

From a very early period the Court of Chancery recognized in certain cases a wife's equity to a settlement out of property which the husband was entitled to receive "*jure mariti*." This equity is now superseded to a great extent by the Married Women's Property Act, 1882, which excludes the husband's rights where the marriage took place after 31st Dec., 1882. It is only applicable now in cases in which the marriage happened before 1883 (*a*), and the property accrued before that date (*b*).

By common law, on marriage, the husband became entitled to receive the rents of the wife's real estates during their joint lives, and he became absolutely entitled to all her chattels personal in possession and to her choses in action, as debts by obligation, contract, or otherwise, *if he reduced them into possession*; or if he did not, as administrator of his wife, if he survived her; and he became also entitled to her chattels real, with full power to alien them, though if he died before his wife, without having reduced into possession her choses in action, or without having aliened her chattels real, they would survive to the wife (*c*).

The jurisdiction to compel the husband, or those claiming under him, to make a settlement upon the wife, was first assumed where it was necessary for the husband to apply to the Court, as in cases in which a trustee declined to pay, &c., the wife's possessory interest to the husband, and the Court, acting upon the maxim, *that*

(*a*) *Vaizey, Settlements*, p. 271;
Lewin (1891), p. 848; *Seton* (1893), p.
 800.

(*b*) *Cf. Reid v. R.*, 31 O. D. 402.

(*c*) See *Langham v. Nenny*, 3 V.,
 p. 469; *Fleet v. Perrins*, 4 Q. B. 500.

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he who seeks equity must do equity, withheld its aid until an adequate settlement was made upon the wife (a).

But since the decision of *Elibank v. Montolieu*, the wife has been permitted actively to assert her equity as a plaintiff in a suit (b); or if there be already an existing suit, by petition therein (c) at any time before the husband has actually reduced his wife's equitable property into possession (d).

Judicature Act, 1873.—The Supreme Court “is now not a Court of law or a Court of equity, but a Court of complete jurisdiction, and if there is any variance between what a Court of law and a Court of equity would have done, the rule of the Court of equity must now prevail,” per Earl Cairns in *Pugh v. Heath* (e), and all the Courts are to recognise and take notice of all equities (f). But the distinction between legal and equitable interests is not abolished (g). The question may therefore arise whether a woman is entitled to claim an equity to a settlement out of a legal chose in action (h), and it seems it would be answered in the affirmative, see judgment of North, J., in *Fowke v. Draycott* (i). As the equity first arose upon the husband's coming to a Court of equity for assistance, which the Court withheld until a provision for the wife was secured (k), it would seem that the Supreme Court will now, as the equitable rule is to prevail, recognise and give effect to this equity whether the subject-matter of the action be legal or equitable. As to the jurisdiction of the Court of Bankruptcy, that Court is now part of the Supreme Court (l). As to its former jurisdiction with regard to this equity, see *Ex p. Norton* (m) and *Ex p. Coysegame* (n).

The right is an obligation which the Court fastens *not* on the property, but upon the right to receive it (o).

(a) *Bosvil v. Brander*, 1 P. W. 459; and see Story (1892), p. 957; Lewin, (1891), p. 835; Seton (1893), p. 800; Vaizey, *Settlements*, p. 271.

(b) *Duncombe v. Greenacre*, 28 B. 472; *Re Briant*, *infra*.

(c) *Groedy v. Lavender*, 13 B. 62; *Scott v. Spashett*, 3 Mac. & G. 599.

(d) And see *Newenham v. Pemberton*, 1 De G. & Sm. 644, and the remarks thereon in *Re Potter*, 7 Eq. 487; and *Re Briant*, 39 C. D. p. 476.

(e) 7 App. Cas., p. 237; *Judicature*

Act, 1873, s. 25, s.s. 11.

(f) *Ibid.*, s. 24, s.s. 1, 2, 4 and 11.

(g) *Joseph v. Lyons*, 15 Q. B. D. 280.

(h) See *Ruffles v. Alston*, 19 Eq. 539.

(i) 29 C. D. p. 1003, *infra*, p. 633.

(k) *Ward v. W.*, 14 C. D. 508.

(l) *Bankruptcy Act, 1883*, s. 93.

(m) 8 De G. M. & G. 238.

(n) 1 Atk. 192.

(o) *Osborn v. Morgan*, 9 Ha. 432.

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2. Duty of Trustees.

A trustee is always justified in refusing to pay over, even at her request, the wife's fund to the husband, thereby enabling him to reduce it into possession; and in thus insisting on affording her an opportunity of asserting her equity to a settlement (*a*). Where a trustee has reason to believe that the husband and wife have agreed to settle a sum of money in his hands, and especially if the wife does not distinctly express a wish that a payment is to be made to her husband, he would be justified in paying the money into Court (*b*).

Where a trustee paid into Court, under the Trustee Relief Act, a fund to which a married woman was absolutely entitled, he was held entitled to his costs as between solicitor and client (*c*). And probably unless his conduct has been capricious or vexatious he would now generally get his costs.

The trustee may join in a settlement of the wife's funds, and, with the consent of the husband, he may transfer them to the trustees of an existing settlement, and such a settlement will be as valid as if directed to be made by the Court (*d*). As to the liability of trustees for acts *after* action commenced, see *infra*, p. 649.

3. Property subject to the Equity.

The wife's equity includes all unsettled property to which she is entitled, whether vested in her in interest before or after marriage (*e*), and she has the same equity out of property in which she has a life interest, as out of that in which she has an absolute interest (*f*).

Where the property of the wife is equitable (or legal?) (*g*) the husband or his assignees will only obtain it upon the terms of making a settlement upon the wife and her children, if she require one to be made (*h*). Where an equitable estate in fee descended on a married woman, the Court, by virtue of her equity to a settlement, has settled

(*a*) *Re Swan*, 2 Hem. & M. 34; *Elibank v. Montolieu*, *supra*.

(*b*) *Re Bendyshe*, 3 Jur. (N. S.) 727. See the Trustee Act, 1893, s. 42.

(*c*) *Re Swan*, *supra*, not followed in *Re Roberts*, W. N. (69) 88.

(*d*) *Montefiore v. Behrens*, 1 Eq. 171; *Re Roberts' T.*, 38 L. J. Ch. 708.

(*e*) *Williams, Exors.* (1893), p. 1278.

(*f*) *Taunton v. Morris*, 11 C. D. 779.

(*g*) See now (*n.*) "Judicature Act, &c." *supra*, p. 631, and *Fowke v. Draycott*, *infra*, p. 633.

(*h*) *Milner v. Colmer*, 2 P. W. 639; *Elibank v. Montolieu*, *supra*.

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the estate on her during her life, but has refused to interfere with the possible estate by curtesy of the husband (*a*).

And even where the property, though in its nature legal, became, from collateral circumstances, the subject of a suit in equity, it appears that the wife's equity to a settlement would attach (*b*).

In *Fowke v. Draycott* (*c*) F., a woman married in 1858, who was entitled to a share in an estate in fee, in 1882 conveyed this estate, under the 91st section of the Fines and Recoveries Act, to A. in fee, her husband not joining. In 1883 her husband, F., commenced an action against A., his wife, and others claiming to be entitled to the rents and profits of her share. North, J., held his common law right to the rents during the coverture was not affected by his wife's alienation, but that she asserting her equity, he was bound, *whether the estate was legal or equitable* (*d*), to provide for her out of the rents, and the whole were settled upon her.

Whatever may be the right of a married woman to have a provision made for her out of the *income* of an estate of which she is equitable tenant in tail, it is not according to the course of the Court, or indeed in its power, to order a settlement to be made of the estate or land to be purchased with money of which the married woman is equitable tenant in tail. For it is clear that the equity to a settlement attaches upon what the husband takes in right of the wife (*e*), and not upon what the wife takes in her own right, and the estate tail being in the wife, the Court has no power to order a settlement of it to be made, or to render such a settlement, if made, binding and effectual against the wife (*f*). Where copyhold property descended in fee upon a married woman, subject to a covenant entered into by a former owner upon his marriage to surrender it to certain uses, under which, had the surrender been made, the married woman would have been *legal tenant in tail*, it was held that she had no equity to a settlement out of property so circumstanced (*g*).

And it is clear that she has no equity to a settlement as against the assignees for value of her husband's interest in land of which she is

(*a*) *Smith v. Matthews*, 3 De G. F. & J. 139.

(*b*) *Sturgis v. Champneys*, 5 My. & C. 97; as to which see the remarks of Westbury, C., in *Gleaves v. Paine*, 1 De G. J. & S. 87; *Bonfield v. Hassell*, 32 B. 217; *Barnes v. Robinson*, 11 W. R. 276; cf. *Re Briant*, 39 C. D. p. 476.

(*c*) 29 C. D. 996, 1003.

(*d*) See (n.) "Judicature Act, 1873," *supra*, p. 631.

(*e*) See *Ward v. W.*, (n.) "Tenancy by entireties," *infra*, p. 651.

(*f*) *Life Association, &c. v. Siddal*, 3 De G. F. & J. 271, 276.

(*g*) *Re Cumming*, 2 De G. F. & J. 376.

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seised for an estate of inheritance in fee (a). Where, however, a sum of money, being rent of real estate (not, as it seems, equitable) to which a husband was entitled *jure mariti*, was paid into Court by an agent, *Shadwell*, V.-C., upon the authority of *Sturgis v. Champneys* (b), held that the assignee of the husband (who was insolvent) was not entitled to it, without a settlement upon the wife (c).

A wife will also be entitled to a settlement out of her *trust term in land*, not only as against her husband, but also against his assignee for valuable consideration. Thus, in *Hanson v. Keating* (d), where a husband and wife assigned, by way of mortgage, the equitable interest of the husband in right of his wife in a term of years, the mortgagee filed his bill against the husband and wife, and the trustee of the legal estate, for a foreclosure and assignment of the term; it was held by *Wigram*, V.-C., upon the authority of *Sturgis v. Champneys* (e), contrary to his own opinion, that the wife was entitled to a provision for her life, by way of settlement, out of the mortgaged premises.

The estate of a *joint tenant in tail in possession*, subject to a term to secure a jointure, has been held to be equitable during the continuance of the term, for the purpose of entitling her to a settlement on a bill filed by her (f).

As against Mortgagees and Assignees (see also Part 7).—Although the Court might allow the wife the income of her property, it by no means follows, when the property out of which she claims a settlement is in the hands of a mortgagee, that he will be allowed by the Court, as against the assignees of the husband, what he may have paid to the wife, out of the income of the property. Thus in *Clark v. Cook* (g), a husband and wife, by deed acknowledged, demised freeholds of the wife to a mortgagee by way of trust, the trusts being to apply the rents and profits in payment of certain premiums of insurance, and of the interest on the mortgage debt, and then in reduction of the principal, until it should be paid off. The husband took the benefit of the Insolvent Debtors' Act. It was held by *Knight-Bruce*, V.-C., in a suit for redemption, instituted by the assignee of the husband against the mortgagee, that

(a) *Durham v. Crackles*, 8 Jur. Siddal, *supra*.

N. S. 1174; *Life Association, &c. v.* (d) 4 Ha. 1.

Siddal, *supra*; *Newenham v. Pemberton*, 17 L. J. Ch. 991.

(e) *Supra*, p. 633 (b).

(b) *Supra*, p. 633 (b).

(f) See *Wortham v. Pemberton*, 1 De G. & Sm. 644, and (n.) "Judicature Act, 1873," *supra*, p. 631.

(c) *Freeman v. Fairlie*, 11 Jur. 447; and see *Life Association, &c. v.*

(g) 3 De G. & Sm. 333.

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the latter was chargeable with the surplus rents which he allowed to the insolvent's wife for her maintenance. "I cannot help suspecting," said his Honor, "that the wife might have had all that has been paid to her if a proper application had been made to the Court. It is a hard and peculiar case, and there must be no costs on either side."

Where, however, a person entitled, *jure mariti*, to the legal interest in leaseholds, mortgages them, the wife has no equity to a settlement thereout, as against the mortgagor seeking foreclosure or sale (*a*), but if the proviso for redemption in such a case is on the repayment by the husband (who has become insolvent), and his wife, of the sum advanced, the power to redeem must be given to her as well as the insolvent assignee (*b*).

A wife is entitled to a settlement out of a life interest in (equitable) property to which her husband is entitled in her right, as against his assignees in bankruptcy or insolvency, for the general assignee of the husband is in exactly the same position as the husband himself, and as against him there can be no distinction between corpus and income, see *Taunton v. Morris* (*c*), where the C. A. gave the whole income to the assignee (*d*). The wife is also entitled to a settlement or maintenance out of her (equitable *e*) life interest, when she is *deserted* by her husband (*ee*). But she is not entitled to a settlement out of a life interest *when she is living with and is maintained by her husband*, who is neither bankrupt nor insolvent (*f*). Nor to a settlement out of property in which she has an (equitable) life interest, as against a person to whom her husband has assigned it for value previous to his insolvency or his desertion of her (*g*): *Secus*, if her interest is absolute (*h*). In *Tidd v. Lister* (*i*), it was held by *Turner*, V.-C., after a very careful examination of the authorities, that a married woman whose husband did not maintain her,

(*a*) *Hatchell v. Eggleston*, 1 Ir. Ch. R. 215.

(*b*) *Hill v. Edmonds*, 5 De G. & Sm. 603; *Durham v. Cockles*, 11 W. R. 138.

(*c*) 11 C. D. 780. See *infra*, (*n*) "Life interest of wife," p. 632.

(*d*) And see *Lamb v. Milnes*, 5 V. 517; *Brown v. Clark*, 3 V. 166; *Jacobs v. Amyatt*, 1 Madd. 376, n.; *Squires v. Ashford*, 23 B. 132; *Sturgis v. Champneys*, 5 My. & C. 97; *Koeber v. Sturgis*, 22 B. 588; *Barnes v. Robinson*, 9 Jur. (N. S.) 245; *Yate Lee*, Bankruptcy (1891), p. 298.

(*e*) See (*n*.) "Judicature Act, 1873," *supra*, p. 633.

(*ee*) *Gilchrist v. Cator*, 1 De G. & Sm. 188, p. 150, and cases cited p. 640, *infra*.

(*f*) *Vaughan v. Buck*, 13 Si. 404, *sed vide* *Wilkinson v. Charlesworth*, *Marsack v. Lyster*, 10 B. 324.

(*g*) *Elliott v. Cordell*, 5 Madd. 149; *Stanton v. Hall*, 2 Russ. & M. 175.

(*h*) *Scott v. Spashett*, 3 Mac. & G. 589.

(*i*) 10 Ha. 140.

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was not entitled, as against a *particular assignee* of the husband, to a settlement, or maintenance out of the income of the real and personal estate to which she was entitled in equity for her life, and his decision was on appeal reluctantly affirmed by *Cranworth*, C. (a). With regard to *Elliott v. Cordell* (b), it is clear, since the decision of *Stiffe v. Everett* (c), that the assignment of a life interest of a married woman in a fund not settled to her separate use, could not, unless it came within the provisions of Malins' Act (d), in any event, be supported beyond the period of the joint lives of the husband and wife. *Hurley v. H.* (e), and *Stanton v. Hall* differed from *Elliott v. Cordell*, inasmuch as in those cases the interest of the wife was determinable upon the death of her husband (f). Even in the case of the wife's estate of inheritance, the husband's assignment by way of mortgage has prevailed to the extent of his life interest (g). And the husband's assignment for value, when maintaining his wife, of income to which he becomes entitled in her right, will be effectual to deprive her of her equity to a settlement as against the assignee for value, though the interest of the wife at the time of the assignment was reversionary (h). A wife is entitled to a settlement out of property to which she becomes entitled *before*, as well as out of what she becomes entitled to *after* marriage (i).

Reversionary property.—The Court, however, cannot order a settlement to be made of the *reversionary personal* property of a married woman. The reason for this is, that the right to the settlement is an obligation which the Court fastens, not upon the property, but upon the right to receive it, and if the right attaches at all, it must attach with all its incidents, one of which is, that the wife waiving it, must waive it (see Part 7) by her consent in Court, which she cannot do in the case of reversionary personal property (k); the question as to whether a wife is entitled to a settlement can only be decided when the reversionary property falls into possession (l).

(a) 3 De G. M. & G. 857, 870; see also *Durham v. Crackles*, 11 W. R. 138; *Re Duffy's T.*, 28 B. 386; but see *Taunton v. Morris*, 11 C. D. 780; *Re Dixon's T.*, 48 L. J. Ch. 592.

(b) *Supra*.

(c) 1 My. & C. 37.

(d) 20 & 21 Vict. c. 57.

(e) 10 Ha. 323.

(f) *Re Godfrey's T.*, 1 Ir. R. Eq. 331.

(g) *Durham v. Crackles*, 11 W. R. 138.

(h) *Life Association, &c. v. Siddal*, 3 De G. F. & J. 271; *Re Carr's T.*, 12 Eq. 609.

(i) *Barrow v. B.*, 18 B. 529.

(k) *Osborn v. Morgan*, 9 Ha. 432, 434.

(l) *Ibid.*, and see *Taylor v. Austen*, 1 Dr. 459, 464; but see now Malins' Act (20 & 21 Vict. c. 57); *Roberts v. Cooper*, (1891) 2 Ch. 335; and the Married Women's Property Act, 1882, s. 5.

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Husband defaulting executor.—So where the husband of a legatee, as executor, is indebted as a defaulter to the testator's estate, and has no right to receive any part of the assets in right of his wife, his wife can claim no equity to a settlement in respect thereof (*a*). But see *Re Briant*, cited *infra*, p. 652.

4. Rights of Children.

When a woman insists upon her equity to a settlement, out of property to which she is absolutely entitled, and not out of a mere life interest, it will always be extended to her children, although she has no children at the time, and a reference will be directed to ascertain what is a proper settlement to be made upon her and her children (*b*); and in *Conington v. Gillat* (*c*) the children of a former marriage were provided for.

The equity is strictly personal to the wife. If she dies before asserting her right, her children cannot insist upon a settlement (*d*). For all the cases concur in showing that children have no right to a settlement "independent of contract or decree" (*e*).

The wife, therefore, may, at any time before the settlement is actually completed, waive her right to it, and thus defeat the interests of her children (*f*); but when she has entered into a contract, or has obtained a decree for a settlement, the interests of the children will not be defeated if she die without waiving it. Thus in *Lloyd v. Williams* (*g*), the wife of a bankrupt being entitled to a legacy, she claimed her right to a settlement out of it, and an agreement was thereupon entered into between the assignees and the executor, whereby, in consideration of a sum to be paid to the assignees, a settlement was to be made upon the wife and her children. The bankrupt obtained his certificate in the lifetime of his wife, who died before any settlement was made in pursuance of the agreement, leaving an only daughter. *Plumer*, V.-C., held, that the death of the mother did not disappoint the claim of the child (*h*). But if no

(*a*) See *Knight v. K.*, 18 Eq. 487; questioned in *Re Briant*, 39 C. D., p. 481, *infra*, p. 652.

(*b*) *Johnson v. J.*, 1 J. & W. 472; *Re Grant*, 14 W. R. 191.

(*c*) 25 W. R. 69.

(*d*) *Scriven v. Tapley*, 2 Eden, 337.

(*e*) Per *Plumer*, V.-C., in *Lloyd v. Williams*, 1 Madd. 467; and see

Roberts v. Cooper, (1891) 2 Ch. 348.

(*f*) *Hodgens v. H.*, 11 Bli. (N. S.) 104; *Murray v. Elibank*, *supra*.

(*g*) 1 Madd. 450.

(*h*) See *Elibank v. Montolieu*, and *Murray v. Elibank*, *supra*; and see *Rowe v. Jackson*, Dick. 604; *Groves v. Perkyns*, 6 Si. 584.

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mention is made of the children of the marriage, the omission, if it has been long acquiesced in, will not be supplied (a). But where the steps taken in a suit are such as to bind the husband to allow a settlement, the children after the death of the mother may insist upon one, although she may not have been bound like her husband. Thus in *Lloyd v. Mason* (b) a married woman entitled to a legacy appeared by her counsel at the hearing of the cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignee sold his interest in the legacy. The solicitors for the purchaser, and for the wife, *agreed to refer* the claim of the wife to their counsel; and the counsel determined that she was entitled to a settlement of a moiety, subject to the costs. Before any further steps were taken, the wife died, leaving children. It was held by *Wigram, V.-C.*, that the husband, and those claiming under him, were, by the steps which had been taken, bound to allow a settlement of part of the fund upon the wife and children; and that, upon the death of the wife, the children were entitled to the portion which would have been settled.

But it has been decided that if a married woman died without having obtained a decree for a settlement, her children, even although she may have filed her bill claiming a settlement, would have no right to file a supplemental bill to enforce one (c).

The right of the children has, moreover, been defeated by the divorce of the mother after she had been declared on petition entitled to a settlement out of her fund in Court to the separate account of herself and her husband, and she was held to be entitled to payment of the fund as a *feme sole* (d).

Waiver.—(See Part 7, *infra*, p. 644.) Although the husband, in the event of his wife's death, is bound by a contract or decree for a settlement, yet the wife can, at any time before it is actually made, *waive her equity to a settlement* (e).

But if the wife, upon the bankruptcy of her husband, established her equity to a settlement, as against the assignees, she will not be

(a) *Johnson v. J.*, 1 J. & W. 479.

(b) 5 Ha. 149.

(c) *Wallace v. Auldjo*, 1 De G. J. & S. 643; and see *De la Garde v. Lempriere*, 6 B. 344; *Baker v. Baylton*, 8 Ha. 210, overruling *Steinmetz v. Halthin*, 1 G. & J. 64.

(d) *Heath v. Lewis*, 13 W. R. 129.

(e) *Fenner v. Taylor*, 2 Russ. & M. 190; *Baldwin v. B.*, 5 De G. & Sm. 319; *Lovett v. L.*, John. 118; *Druitt v. Willens*, 23 L. R. Ir. 436.

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allowed afterwards to waive it in favour of her husband, so as to defeat the rights of her children, though she might do so in favour of the assignees (a).

5. As to the Amount to be Settled.

In the absence of special circumstances, one-half will be settled (b). But "there is no doubt that the rule of the Court . . . was in former times supposed to be, that the fund should be equally divided between the wife and children on the one hand, and the husband on the other. It is equally clear that in modern times that rule has been considerably relaxed, and that as regards the shares in which the fund should be divided, considerable latitude has been assumed by the Court . . . so as to admit of the discretion of the Court being exercised in each individual case" (c). And the discretion will not be interfered with except some facts have been excluded, or some principle violated (d).

Settlement of whole.—The Court will not settle the whole fund unless (1) the husband is insolvent or unable to support the wife, or (2) has been guilty of gross misconduct (e). The whole fund or income has been settled in the following cases:—

In cases of insolvency or inability to maintain.—See *Brett v. Greenwell* (f), where the husband had taken the benefit of the Insolvent Debtors Act; when the husband has become bankrupt, and has already received a considerable fortune from his wife (g); or where he is insolvent and has made no settlement on her (h), even as against a purchaser for value from the assignees of the husband (i); or as against his own assignee for value (k); except in the case of a particular assignee for value of a *life interest* of the wife (l), or of the accumulated arrears of past income of her real or personal pro-

(a) *Barker v. Lea*, 6 Madd. 330; *Whittem v. Sawyer*, 1 B. 593.

(b) *Spirett v. Willows*, 1 Ch., p. 522; 4 Ch. 407.

(c) Per *Cairns*, L.J., *Re Suggitt's Trusts*, 3 Ch. 215, 217; *Taunton v. Morris*, 11 C. D. 779; *Roberts v. Cooper*, (1891) 2 Ch. 339.

(d) Per *Bowen*, L.J., *Roberts v. Cooper*, (1891) 2 Ch., p. 345.

(e) *Re Suggitt's Trusts*, *supra*; *Reid v. R.*, 33 C. D. 220.

(f) 3 Y. & C., Ex. Cn. 230.

(g) *Gardner v. Marshall*, 14 Si. 575;

Re Merryman's T., 10 W. R. 331; *Smith v. S.*, 3 Gif. 121.

(h) *Taunton v. Morris*, 11 C. D. 779; *Francis v. Brooking*, 19 B. 347; *Scott v. Spashett*, 3 Mac. & G. 599; *Re Cordwell's Estate*, 20 Eq. 644.

(i) *Ibid.*

(k) *Marshall v. Fowler*, 16 B. 249; *Re Welchman*, 1 Gif. 31; *Duncombe v. Greenacre*, 29 B. 578; *Scott v. Spashett*, 3 Mac. & G. 509.

(l) *Tidd v. Lister*, 3 De G. M. & G. 857; see note (i), *supra*, p. 635.

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perty (*a*). There will also be a stronger disposition to settle the whole fund upon the wife when it is small and barely sufficient for a provision for the wife and children (*b*).

By a decree of judicial separation, the wife's choses in action not reduced into possession at the date of the decree become, under the Divorce and Matrimonial Causes Act (*c*) her absolute property as if she were a *feme sole*. Where, therefore, a wife instituted a suit to enforce her equity to a settlement of a trust fund, and while the suit was pending she obtained a decree of judicial separation from her husband on the ground of cruelty, *Romilly*, M.R., ordered the fund to be paid to her, and refused the husband his costs (*d*). Although the circumstances of the husband and wife may be such as would justify the Court, as between them, in settling the whole fund, yet the conduct of the wife may have been such, as regards an intended assignee of the fund, as to make the Court hesitate as to whether, against such assignee, she should have anything settled (*e*).

In cases of misconduct on part of the Husband.—Adultery of husband (*f*); where he has deserted or behaved cruelly to his wife, and does not afford her the means of support (*g*); living apart from wife, without contribution, amount too small to divide (*h*); disregarding order for restitution of conjugal rights, and refusing to live with wife (*i*).

Other Proportions.—Three-fourths were settled in the following cases: Desertion and insufficient provision (*k*); negotiations between parties whereby assignees have been put to great expense (*l*); husband bankrupt, but contributing earnings (*m*).

(*a*) *Newman v. Wilson*, 31 B. 34; *Re Carr's T.*, 12 Eq. 609.

(*b*) *Re Kincaid's T.*, 16 Jur. 106; 1 Drew. 326; *Re Hooper's T.*, 6 W. R. 824. See judgment of *Kay*, L.J., *Roberts v. Cooper*, (1891) 2 Ch., p. 346; but see judgment of *Cairns*, L.J., in *Re Suggitt's Trusts*, *supra*.

(*c*) 20 & 21 Vict. c. 85, s. 25.

(*d*) *Johnson v. Lander*, 7 Eq. 228; *Re Coward, &c.*, 20 Eq. 179.

(*e*) See judgment of *Kay*, L.J., in *Roberts v. Cooper*, (1891) 2 Ch., p. 346.

(*f*) *Barrow v. B.*, 5 De G. M. & G. 782.

(*g*) *Dunkley v. D.*, 2 De G. M. & G. 390; *Re Cutler*, 14 B. 220; *Gilchrist v. Cator*, 1 De G. & Sm. 188; *Gent v. Harris*, 10 Ha. 383; *Layton*

v. L., 1 Sm. & G. 179; *Re Disney*, 2 Jur. (N. S.) 206; *Koeber v. Sturgis*, 22 B. 588; *Re Ford*, 32 B. 621; *Boxall v. B.*, 27 C. D. 220.

(*h*) *Fowke v. Draycott*, 39 C. D., p. 1004.

(*i*) *Reid v. R.*, 33 C. D. 220.

(*k*) *Coster v. C.*, 9 Si. 597.

(*l*) *Walker v. Drury*, 17 B. 482; *Vaughan v. Buck*, 1 Si. (N. S.) 284; *Spirott v. Willows*, 1 Ch. 520, 4 Ch. 407; *Re Briant*, 39 C. D. 471 (500% out of about 700%).

(*m*) *Callow v. C.*, 55 L. T. 154; *Re Suggitt's Trusts*, 3 Ch. 215; *Re Callow's T.*, 55 L. T. 154; *Walsh v. Wason*, 8 Ch. 482; *Seton* (1893), p. 795 (two-thirds).

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6. As to the Settlement.

A wife is as much entitled to a settlement out of a small fund as out of a large one, although it be so small that her consent might not be required for payment to the husband by reason of its smallness (*a*). In the absence of special circumstances, the income of a *personal fund* will be given to the wife to her separate use for life, without power of anticipation (*b*), and subject thereto upon trust for the children, whether by present or future husband, or any one or more of them, in such shares if more than one, and in such manner as the wife and husband shall during their joint lives by deed, with or without power of revocation, jointly appoint, and in default of such appointment, &c., then as the wife, if she survive her husband, shall appoint, and in default of appointment and so far, &c., then to her children of the present or any future marriage, who being sons shall attain twenty-one, or being daughters shall attain that age or marry (*c*); and if there should be no such children, then, in the absence of special circumstances, the Court will not defeat the legal right of the husband but give the fund to him whether he survives his wife or not (*d*), or, his particular assignee for value (*e*), or general assignees (*f*), absolutely (*g*). There will also in general be inserted the usual powers of maintenance, accumulation and advancement (*h*), except where the fund is under the control of the Court, when they are unnecessary (*i*).

Where the husband assents to the whole of the fund belonging to the wife being settled, in the absence of special circumstances, such

(*a*) *Re Cutler*, 14 B. 220; *Re Kincaid's T.*, 1 Drew. 326. See (*n*). "Small Fund," p. 643.

(*b*) *Spirott v. Willows*, 4 Ch. 407.

(*c*) See *Beales v. Brown*, Seton, Form 7, p. 796; *Re Briant*, 39 C. D., p. 482, where the power to appoint was limited to the wife by will; *Croxton v. May*, 9 Eq. 408, 409; *Gent v. Harris*, 10 Ha. 383, 384; *Re Gowan*, 17 C. D. 778.

(*d*) *Walsh v. Wason*, 8 Ch. 482, and cases there cited; and see the decree, Seton (1893), p. 795.

(*e*) *Carter v. Taggart*, 1 De G. M. & G. 286; and see Form of Order,

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3 De G. & Sm. 55; *Re Tubb's E.*, 8 W. R. 270; *Ward v. Yates*, 1 Dr. & Sm. 80.

(*f*) *Ex p. Pugh*, 1 Dr. 202; *Gent v. Harris*, 10 Ha. 383, 384.

(*g*) *Spirott v. Willows*, *supra*; and see the form in *Walsh v. Wason*, *supra*, where the trust in default of children becoming entitled is for the incumbrancers of the husband according to their priorities and subject thereto, in trust for the husband.

(*h*) *Croxton v. May*, 9 Eq. 404.

(*i*) *Smithers v. Green*, Seton (1893), F. 9, p. 798.

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as bankruptcy, misconduct, or desertion on the part of the husband, the proper form of settlement in such a case is to the wife for her separate use without power of anticipation for life, remainder *to the husband during his life, or until he becomes bankrupt or attempts to alien or incumber*, remainder to such of the children of the wife by her present or future husband as being sons shall attain twenty-one, or being daughters shall attain that age or marry with consent of guardians, if more children than one as tenants in common, and in default of children attaining a vested interest, in trust for the husband absolutely (a).

Where the wife's *real property* had been mortgaged by herself and her husband, in a suit by the wife for a settlement of the *equity of redemption*, and for redemption as against the mortgagee and foreclosure against her husband and his assignees who had disclaimed; the decree made was, "that upon the plaintiff redeeming the mortgaged premises, the same be settled (the defendant W., the husband, by his counsel consenting) upon trust for the plaintiff for her separate use during her life, with remainder to her children as she shall by deed duly executed, or by her last will appoint, and in default of appointment in trust for her children equally; and in case the plaintiff shall die without leaving any children, then in trust for the plaintiff and her heirs absolutely (such settlement or re-conveyance to be approved by the judge); but in default of the plaintiff redeeming the mortgaged premises as aforesaid, let the plaintiff's bill be dismissed as against P. (the mortgagee) with costs, to be taxed, &c., and paid by B. the next friend of the plaintiff" (b).

Where an intestate's *equitable estate in fee* had descended on a married woman, there was a declaration that it ought to be settled in trust for her during her life for her separate use free from anticipation—as to a *business* then being carried on, with remainder to her children; as to the freehold house and farm during her life only (so as not to interfere with her husband's possible tenancy by the curtesy) with a direction that all proper and necessary deeds and instruments for the purpose of carrying into effect the above declaration and decree should be settled by the judge: the costs of all parties of and incident to the preparation, approval and execution thereof to be raised and paid out of the property to be comprised therein (c).

(a) *Smithers v. Green*, Seton (1893), S. 87, 98; Seton (1893), p. 796.
 F. 9, p. 798. (c) *Smith v. Matthews*, 3 De G. F. &
 (b) *Gleaves v. Paine*, 1 De G. J. & J. 139; Seton (1893), p. 796.

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In *Roberts v. Cooper* (a) a husband and wife in very poor circumstances had assigned two reversionary interests of the wife to a purchaser for 170*l.*, the deed being acknowledged by the wife; as a matter of fact the interests were not within Malins' Act and the assignment was ineffectual in law. One interest, 500*l.*, was paid into Court and carried to a separate account. The assignees applied for payment to them, the wife set up her equity. It appeared that the other interest, value about 500*l.*, had been received by the husband and wife, and that the wife had received benefit from the purchase money. The C. A., with the assignees' consent, settled a moiety, and settled it in such a manner that the wife should receive yearly a sum out of income and capital, and that in default of children the fund should go to the assignee (b).

Where there is a fund in Court, to a share of which a married woman is entitled in actual possession, the Court in an action by her may order a settlement in favour of her or her children although the fund is not distributable until further consideration, and although her share has not been ascertained (c).

Small Fund.—In order to avoid the expense of a settlement where the fund is small, it will be ordered to be brought into Court (d), if not there already, and the Court will direct the dividends to be paid to the wife for her separate use for life, and either declare the trusts after her death (e), or give liberty to the persons entitled at her death to apply (f).

Refusal to execute Settlement.—If a person ordered by the Court to execute an instrument neglects or refuses to do so the Court can nominate a person to execute it (g).

Post-nuptial Settlement.—It is clear that where the Court directs a settlement to be made upon the wife, "the Court will support it as a good settlement, for valuable consideration" (h); and if after

(a) (1891) 2 Ch. 335.

(b) Seton (1893), F. 10, p. 799; and see *Boxall v. B.*, 27 C. D. 220.

(c) *Re Robinson's S. E.*, 12 C. D. 188.

(d) *Bagshaw v. Winter*, 5 De G. & Sm. 468.

(e) *Ibid.*, and see *Guy v. Pearkes*, 18 V. 195, a case of desertion referred to in *Re Suggitt's Trusts*, 3 Ch., p. 219; *Re Ford*, 32 B. 621; *Watson v. Marshall*, 17 B. 363; *Walker v. Drury*,

17 B. 484; *Wright v. King*, 18 B. 461.

(f) *Re Cutler*, 14 B. 220, 222; and see *Smithers v. Green*, Seton (1893), p. 798. And see the case of a lunatic husband not so found, *Stead v. Colley*, 2 My. & K. 52.

(g) See Judicature Act, 1884, s. 14; Seton (1893), Form 2, p. 375.

(h) See *Wheeler v. Caryl*, Amb. 121; *Simson v. Jones*, 2 Russ. & M. 365.

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marriage, the wife being entitled to a portion which the husband cannot touch without the aid of the Court, and the trustees will not pay it without a settlement, if the husband does agree to it, and do that which the Court would decree, it is a good settlement as against his creditors (*a*). So a legacy due to a married woman may, with the consent of her husband, be paid to the trustees of a settlement already in existence, upon trusts under which the life interest of the husband is determinable on alienation or incumbrance thereof (*b*).

Even if trustees in possession of the property of a married woman should, on the mere request of her husband, transfer it to new trustees upon trust for her separate use, such trust will be good as against his creditors (*c*). But if the husband has once reduced into possession the equitable choses in action of his wife, any subsequent settlement of them would not be valid as against his creditors (*d*).

7. Waiver of Settlement.

By Consent of Wife.—If a woman wish to waive her equity to a settlement, her consent to her husband having her property must be formally taken upon her examination in Court (*e*). Where, however, a married woman upon being examined, expressed a wish that part of the fund to which she should be entitled should be retained in Court, and the income paid to her with liberty for her to apply for payment of the capital at a future period, if she desired it, the Court made the order to carry out her wish (*f*). In general, if the wife is abroad, her consent to payment of the fund to her husband must be taken by commission issuing from the Court (*g*), or from a competent Court abroad (*h*). However, in the case of *Minet v. Hyde* (*i*), it was ordered that the married woman should appear before some of the plaintiffs and a magistrate of Breda, to be privately examined in the French or German language, as to her consent, and the examination

(*a*) *Wheeler v. Caryl*, Amb. 121, 122; *Moor v. Rycault*, Pr. Ch. 22.

(*b*) See *Montefiore v. Behrens*, 1 Eq. 171; *Middlecome v. Marlow*, 2 Atk. 519; *Re Wray's T.*, 16 Jur. 1126.

(*c*) *Ryland v. Smith*, 1 My. & C. 53.

(*d*) *Ryland v. Smith*, 1 My. & C. 53; *Wall v. Tomlinson*, 16 V. 413, and *Glaister v. Hower*, 8 V. 207.

(*e*) *Beaumont v. Carter*, 32 B. 586. Where the fund is small, see *infra*, p. 647.

(*f*) *Re Craddock's T.*, W. N. 1875, p. 187.

(*g*) *Gibbons v. Kibbey*, 10 W. R. 55; *Ireland v. Trinbaith*, 14 W. R. 275.

(*h*) *Campbell v. French*, 3 V. 323, 4 R. R., p. 5.

(*i*) 2 Bro. Ch. 663.

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attested by notaries public, and translated on oath (*a*). In order that the examination may be such that the free and unbiased wishes of the wife may be ascertained, neither her husband nor his solicitor nor any persons connected with him ought to be present (*b*), and the examination cannot be dispensed with, by reason of her wishes having been ascertained by the trustees (*c*).

The Court cannot, in the absence of fraud or compulsion on the part of the husband, refuse to take the wife's consent (*d*), even when it appears the wife, a ward of Court, married the day after she came of age (*e*).

The consent of a married woman will not be taken until the amount of the fund is ascertained (*f*); except perhaps where it is only liable to diminution by the deduction of unascertained costs, the taxation of which has been directed (*g*); in which case her consent refers to the residue of the fund after such payment (*h*).

The consent will not be binding if made under a mistake. Thus, where she consented to her husband receiving the whole fund, being ignorant that the effect of his previous insolvency (of which the Court was not informed) would be to give it to his assignees, the Court ordered the whole fund to be settled, for it is the duty of the Court to explain to a married woman what she gets and loses by her consent (*i*).

The Court has power to postpone for a time the transfer to the husband, notwithstanding the consent (*k*), and she may retract at any time before the transfer has been completed (*l*).

It has been held, however, that upon the application of husband and wife for the payment of a life annuity given to her by will, her consent was unnecessary (*m*).

(*a*) And see *Bourdillon v. Adair*, 3 Bro. Ch. 237; and the order given, *Seton* (1893), F. 4, p. 784.

(*b*) *Re Bendyshe*, 3 Jur. (N. S.) 727.

(*c*) *Re Swan*, 2 Hem. & M. 34.

(*d*) *Willats v. Cay*, 2 Atk. 67; *Wright v. Rutter*, 2 V. jun. 673, 3 R. R. 24; *Longbottom v. Pearce*, 3 De G. & J. 545, and *Biddles v. Jackson*, *ibid.*, 544.

(*e*) *White v. Herrick*, 4 Ch. 345.

(*f*) *Edmunds v. Townshend*, 1 Anst. 43; *Jernegan v. Baxter*, 6 Madd. 32;

Sperling v. Rochfort, 8 V. 180; *Godber v. Laurie*, 10 Price, 152; *Moss v. Dunlop*, 8 W. R. 39.

(*g*) *Packer v. P.*, 1 Coll. Ch. R. 92.

(*h*) *Musgrove v. Flood*, 1 Jur. (N. S.) 1086.

(*i*) *Watson v. Marshall*, 17 B. 363.

(*k*) *Wright v. Rutter*, *supra*; *Penfold v. Mould*, 4 Eq. 565.

(*l*) *Penfold v. Mould*, *supra*.

(*m*) *Shilleto v. Collett*, 7 Jur. (N. S.) 385.

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Where the wife waives her equity to a settlement, and consents to her husband having her property, an affidavit must be made by the husband and wife, either that there was no settlement upon their marriage, or if there be a settlement, it should be produced, and an *affidavit* made by the husband and wife that there was no other settlement, and the Court must be satisfied on the certificate of counsel, or by inspection which is now the usual practice (*a*), that the settlement itself does not affect the property which the wife consents to her husband having (*b*). The affidavit of the wife alone has been allowed where the husband is residing permanently abroad (*c*) or refuses to make an affidavit (*d*). And where the husband and wife are both resident abroad, the Court has accepted as evidence that there was no settlement on their marriage, an affidavit by a solicitor disclosing facts, which made it unlikely that there was a settlement, and stating positively that he had been told by the lady and her husband that there was none (*e*).

Even where it is proposed to pay the fund to the wife, with the husband's consent, on her separate receipt, or to her trustees, her examination will not be dispensed with (*f*), unless the wife is entitled to the fund to her separate use, in which case her examination and consent are unnecessary (*g*), and on her petition payment would be made on her receipt alone. An affidavit, however, that there is no settlement thereof must be produced (*h*). In one case, however, a transfer of such a fund was made into the joint names of the husband and wife without her examination, and consent on their joint petition (*i*). And in another case, her consent to the transfer of a fund in Court, her separate property, to her husband, was required, though she had joined him in a petition for the purpose (*k*).

And payment will be made to a married woman suing as a *feme sole* under a protection order of her share in an administration suit,

(*a*) Seton (1893), p. 787.

(*b*) Britten v. B., 9 B. 143, and note; Rose v. Rolls, 1 B. 270.

(*c*) Wilkinson v. Schneider, 9 Eq. 423; Elliott v. Remington, 9 Si. 502.

(*d*) Anon., 3 Jur. (N. S.) 839.

(*e*) Woodward v. Pratt, 16 Eq. 127.

(*f*) Mawe v. Heaviside, 7 Jur. (N. S.) 817; Gibbons v. Kibbey, 10 W. R. 55.

(*g*) Macq. II. & W. 304.

(*h*) Anon., 3 Jur. (N. S.) 839.

(*i*) *Re Crump*, 34 B. 576.

(*k*) Wordsworth v. Dayrell, 4 W. R. 689.

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upon her affidavit, that the separation continues, and that there was no settlement nor agreement for a settlement (*a*).

Where the wife is domiciled in a foreign state, upon proof that by the laws of such state her husband would be entitled to the whole of the property, without making any provision for her, the consent of the wife will not be required by the Court, and the fund will be ordered to be paid to the husband, without his being required to make any settlement upon her (*b*) ; or if the property of the wife was money to arise from the sale of land, the husband (not being an alien) electing to take it in an unconverted state might have a conveyance of it to himself in fee (*c*), and *semble* an alien might now do so under the Naturalization Act, 1870 (*d*).

But where the lady is a ward of the Court, although by the law of the country where her husband is domiciled she has no equity to a settlement, the Court will not part with funds belonging to her unless satisfied that a proper provision has been made upon her (*e*). The Court, however, has a discretion in such a matter: thus where the infant was not and never had been domiciled here, and the only circumstance rendering it possible to treat her as a ward of Court was the fact that money had been paid to her account in the Court of Chancery, the Court ordered the money to be paid to her husband, a domiciled Frenchman (*f*).

The proof of the law in foreign states in such cases being one of fact, it will not be decided by authority, but by the evidence in each case (*g*).

Where the fund is under 200*l.* or 10*l.* a year, or is likely to be reduced below that sum by costs, it may be ordinarily paid to the husband without the consent of the wife being taken by examination, but under special circumstances, as for instance, where she married the day after she came of age, the Court insisted upon her separate examination (*h*). But before payment it must be shown that it is

(*a*) *Ewart v. Chubb*, 20 Eq. 454.

(*b*) *Sawyer v. Shute*, 1 Anst. 63; *Campbell v. French*, *supra*; *Anstruther v. Adair*, 2 My. & K. 513; *Re Molyneux*, 5 Ir. Ch. R. 346; *McCormick v. Garnett*, 5 De G. M. & G. 278; *Re Letts' T.*, 7 L. R. Ir. 132; *Re Marsland*, 55 L. J. Ch. 581.

(*c*) *Hitchcock v. Clendinen*, 12 B. 534.

(*d*) 33 & 34 Vict. c. 14, amended by

33 & 34 Vict. c. 102; 35 & 36 Vict. c. 39.

(*e*) *Re Tweedale's Set.*, John. 109.

(*f*) *Brown v. Collins*, 25 C. D. 56; and see *Hope v. H.*, 4 De G. M. & G. 328, 345.

(*g*) Cf. *Ex p. McCormick v. Garnett*, 5 De G. M. & G. 278; *Re Todd*, 19 B. 582.

(*h*) *White v. Herrick*, 4 Ch. 345.

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not in settlement (*a*). An affidavit of no settlement has also been dispensed with where the fund was only 10*l.* (*b*); and where the husband consents to payment to his wife on her own separate receipt, her separate examination where the sum does not exceed 500*l.* will be dispensed with (*c*). In Ireland, it seems money in Court belonging to the wife, not exceeding 100*l.*, may be paid to her husband without her consent (*d*).

The wife, although her consent may not be requisite before payment, is as much entitled to a settlement out of a small as out of a large sum (*e*).

Except in some cases under Malins' Act (*f*), a married woman cannot waive her right to take her *reversionary* personal property by survivorship (*g*), whether it might possibly vest in possession during the coverture, or could only vest after the husband's death (*h*). Nor would the Court allow the interest of the wife to be accelerated, to enable her to dispose of it as if in possession (*i*).

An infant *feme covert* cannot give her consent to payment to her husband (*k*). A female ward of the Court, married without its authority, or in contempt of it, will not be allowed to waive her right to a settlement out of her own property (*l*); and the settlement will in general be much less in favour of the husband than in ordinary cases, as the Court will attend principally to the interest of the wife, and her children; and if the contempt has been flagrant, the rule has been to exclude the offending husband from all interest in the wife's fortune (*m*).

Where an infant ward of the Court married with the consent of

(*a*) *Elworthy v. Wickstead*, 1 J. & W. 69; *Hodges v. Clarke*, 1 De G. & Sm. 354; *Roberts v. Collett*, 1 Sm. & G. 138; *Wallace v. Greenwood*, 16 C. D. 362.

(*b*) *Veal v. V.*, 4 Eq. 115.

(*c*) *Re Morton's Estate*, W. N. (1874) 181; *Andrewes v. Tyrrell*, 29 Sol. Jo. 622; *Seton* (1893), p. 789.

(*d*) *Re Surridge's T.*, 17 Ir. Ch. 163.

(*e*) *Re Cutler*, 14 B. 220; *Re Kincaid T.*, 1 Drew. 326.

(*f*) 20 & 21 Vict. c. 57.

(*g*) *Osbourn v. Morgan*, 9 Ha. 432, 434; *Re Godfrey's T.*, 1 Ir. Eq. 531; *Whittle v. Henning*, 2 Ph. 731.

(*h*) *Box v. B.*, 2 Con. & Law. 605; *Box v. Jackson*, Dru. Cas. t. Sugd. 42, where all the authorities on the subject are reviewed.

(*i*) *Purdew v. Jackson*, 1 Russ. 1; *Cresswell v. Dewell*, 4 Gif. 460; *Fitzgerald v. F.*, L. R. 2 P. C. 87; *Shelford*, R. P. S. (1893), p. 315; see note to *Ryall v. Rowles*.

(*k*) See *Stubbs v. Sargon*, 2 B. 596; *Abraham v. Newcombe*, 12 Si. 566; *Shipway v. Ball*, 16 C. D. 376.

(*l*) *Stackpole v. Beaumont*, 3 V. 89, 3 R. R. 52; *Gynn v. Gilbard*, 1 Dr. & Sm. 356.

(*m*) See *Seton* (1893), p. 901; *Simpson, Infants* (1890), p. 344.

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her mother, but without any application to the Court, *Malins*, V.-C., refused to take her consent while a minor, but made an order for payment of the dividends of a fund in Court to her separate use, until further order (a); and in another case a ward of the Court, who married without its leave, though with the consent of her guardian, was allowed, on *coming of age*, to consent to her husband having her property without his making a settlement on her (b). The Court cannot *compel* an infant ward to make a settlement (c).

8. Where the Equity is barred, or does not arise.

Reduction into possession by Husband.—The actual reduction into possession by the husband of the rents and profits of his wife, or of any fund belonging to her, or of her choses in action will defeat the wife's right to a settlement thereout; and, as laid down by Lord *Eldon*, in the principal case, "previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband, but not if the bill has been filed; and if the husband, or those claiming under him, can obtain the property of the wife by an action at law, equity will not by injunction prevent them from doing so" (d). But after a writ has been filed, trustees cannot safely make any payments to the husband (e), and cannot be advised to act without first consulting the Court (f). With regard to the latter part of the above citation, injunctions were formerly granted to restrain the husband from proceedings in the Ecclesiastical Courts for a legacy due to his wife until he had agreed to make provision for her (g). As to what constitutes reduction into possession, see *Hornsby v. Lee* (h), *Donnelly v. Foss* (i), *Re Barber* (k), *Widgery v. Tepper* (l), *Rogers v. Bolton* (m).

Adequate Settlement.—The equity will be barred by an *adequate*

(a) *Shipway v. Ball*, 16 C. D. 376.

(b) *Bennett v. Biddles*, 10 Jur. 534.

(c) *Buckmaster v. B.*, 13 App. Cas. 61; *Leigh v. L.*, 40 C. D. 290.

(d) See *Milner v. Wilmer*, 2 P. W. 641; *Jewson v. Moulson*, 2 Atk. 420; *Allday v. Fletcher*, 1 De G. & J. 82; *Re Swan*, 2 Hem. & M. 34, 37; *Hornsby v. Lee*, post.

(e) *Macaulay v. Philips*, 4 V. 18; *De la Garde v. Lempriere*, 6 B. 344,

347.

(f) *Lewin* (1891), p. 674.

(g) *Jewson v. Moulson*, 2 Atk. 420; *Gardner v. Walker*, 1 Stra. 503; and see (n.) "Judicature Act, 1873," supra, p. 631.

(h) Post.

(i) 7 L. R. 1r. 439.

(k) 11 C. D. 442.

(l) 7 C. D. 423.

(m) 8 L. R. 1r. 69; *Lewin* (1891), p. 834.

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settlement having been made upon her, but not by an inadequate settlement, unless it be by an express stipulation before marriage (*a*). And in a case, where an adequate settlement had been made upon the wife, the husband was held to be entitled to the whole fund, although he was living apart from his wife, they having separated by mutual consent and agreement, and no blame being imputed to one party more than the other (*b*). And it is not essential that the settlement shall have been made by the husband (*c*).

The wife's equity to a settlement, moreover, may be excluded by an exception of the particular fund or property from the husband's covenant in her marriage settlement to settle future acquired property (*d*).

If the settlement is inadequate, the Court may direct a further settlement (*e*). If it is illusory, her equity will not be barred (*f*).

Fraud of Wife.—The Court will not allow the equity to be made an instrument of fraud (*g*). So where a woman at the time of her marriage owes more than the whole amount of her property, she will have no equity to a settlement out of it as against the assignees of her husband, in whose bankruptcy her debts are proved (*h*). But if the value of her property exceeds the amount of the debts she owed before marriage, she may be held entitled to a settlement out of the property, *after provision* has been made for payment of the debts (*i*).

A married woman may, by fraud, as for instance, in holding out to a purchaser for value, that an assignment made after marriage was made before, preclude herself from claiming her equity to a settlement, as against the purchaser (*k*).

Adultery of Wife.—If the wife be living in adultery, apart from her husband, she cannot, except under very peculiar circumstances (*l*), insist upon her equity to a settlement (*m*); but even

(*a*) *Salwey v. S.*, Amb. 692; *Garforth v. Bradley*, 2 V. 675; *Spirott v. Willows*, 1 Ch. 520, 4 Ch. 407.

(*b*) *Re Erskine's T.*, 1 Kay & J. 302; *Spicer v. S.*, 24 B. 365; *Aquilar v. A.*, 5 Madd. 414.

(*c*) *Giacometti v. Prodgors*, 8 Ch. 338.

(*d*) *Brooke v. Hickes*, 12 W. R. 703.

(*e*) *Stackpole v. Beaumont*, 3 V. 98; and see *Spirott v. Willows*, 1 Ch. 520, 4 Ch. 407.

(*f*) *Irwin v. I.*, 5 Ir. Eq. R. 373.

(*g*) *Re Lush's T.*, 4 Ch. 591.

(*h*) *Bonner v. B.*, 17 B. 86.

(*i*) *Barnard v. Ford*, 4 Ch. 247; *Miller v. Campbell*, W. N. (1871), p. 210.

(*k*) *Re Lush's T.*, 4 Ch. 591; *Barrow v. Manning*, W. N. (1878), p. 122; *Cahill v. C.*, 8 App. Cas. 437; and see *Roberts v. Cooper*, (1891) 2 Ch. 335.

(*l*) *Re Lewin's T.*, 20 B. 378.

(*m*) *Carr v. Eastabrooke*, 4 V. 146.

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then it seems the husband will not be allowed to receive the whole of her property, while he does not maintain her. See *Ball v. Montgomery* (a), in which case the Court ordered the future dividends of a settled fund to be paid into Court, subject to further order; observing that the wife's delinquency was a good ground for not paying it to her, but was not a ground for letting the husband receive the whole of the property, which, being hers originally, was intended to be his, partly to support her. *Seeus*, where the husband has by contract an interest in her property during their joint lives, and her misconduct obliges him to separate (b). Where both husband and wife are living in adultery, it has been held that the wife may claim a settlement (c). But mere living apart from her husband is no bar (d).

A female ward of Court, married without its consent, will not be barred from her claim to a settlement, although she should be living in adultery (e).

Foreign Domicil of Husband.—The equity does not arise where the domicil of the husband is foreign, and his country does not recognise such a right (f).

Reversionary Property.—The equity only arises when the fund is ready for reduction into possession, and does not arise where the fund is reversionary (g).

Tenancy by Entireties.—The equity arises where the husband has to get the assistance of the Court to get the benefit of *his wife's property*. Therefore, when husband and wife take by "entireties," the property not being hers, but her husband's, the equity does not arise (h). And the M. W. P. Act, 1882, has not, *practically*, affected the law, for the operation of that statute upon an interest of a husband and wife held by entirety was determined by the C. A. to be that the husband would take one half of the joint share in his own right, and the wife the other *to her separate use* (i). Thus,

(a) 2 V. jun. 191, 2 R. R. 197.

(b) See *Duncan v. Campbell*, 12 Si. 616.

(c) *Greedy v. Lavender*, 13 B. 62.

(d) *Eedes v. E.*, 11 Si. 569.

(e) *Ball v. Coutts*, 1 V. & B. 302, 304; *Re Anne Walker*, L. & G. t. Sugd. 299.

(f) *Supra*, p. 647, note (b); *Campbell v. French*, 3 V. 321; 4 R. R. 5; *Anstruther v. Adair*, 2 My. & K. 513; *Re Marsland*, 34 W. R. 540, Manx

domicil. But where the lady is a ward of Court, see *Re Tweedale's Set.*, John. 109; *Brown v. Collins*, *supra*, p. 647.

(g) *Supra*, p. 636; *Osborn v. Morgan*, 9 Ha. 432; *Purdew v. Jackson*, 1 Russ. 1.

(h) *Atcheson v. A.*, 11 B. 485; *Ward v. W.*, 14 C. D. 507; *Re Bryan*, *ibid.*, p. 519.

(i) *Re March*, 27 C. D. 166; *Re Jupp*, 39 C. D. 151. Cf. *Dias v. Do Livera*, 5 A. C. 123; *Re Dixon*, 42 C. D. 306.

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although the rights of the husband and wife are altered, *inter se*, the equity does not arise, for there is no wife's property which the husband can claim.

Life interest of Wife.—It has been before stated, p. 635, that, although a married woman, as against the assignees of her husband in *bankruptcy or insolvency*, is entitled to have a settlement or maintenance out of her equitable property, in which she has *only a life* interest, she, nevertheless, cannot claim either, as against the legal right of her husband, not being bankrupt or insolvent, although he may be in difficulties, for the husband is entitled to the wife's income as long as he maintains her to the best of his ability, and they are living together (*a*). Nor can she claim a settlement or maintenance out of the income of her equitable property, as against the *particular* assignee for value of her husband, although subsequently to the assignment he may become bankrupt or insolvent, or desert and leave her utterly destitute (*b*). But if the husband deserts the wife, leaving her unprovided for, the Court will allow her past and future maintenance out of the income of her life interest in equitable property, not specifically assigned by the husband for value (*c*).

9. Against whom the equity is binding.

The equity of a wife to a settlement is binding not only upon her husband, but also upon all persons claiming generally from or under him as executor, his trustees in bankruptcy, or under a general assignment for the payment of his debts (*d*). It is also binding upon a purchaser from the husband for valuable consideration (*e*), subject to the somewhat anomalous exception in the case of an *equitable life* interest of the wife which has been already noticed (*f*).

The wife's equity to a settlement is moreover paramount to the right which an executor or administrator has to set off a debt due to the estate from a husband, against any legacy under the will or share under the intestacy to which his wife is entitled, unless, perhaps, when he is indebted *as executor*, see p. 637, *supra*. Thus in *Re Briant* (*g*), by a will of a person who died in 1877, a share of residue was settled

(*a*) *Vaughan v. Buck*, 13 Si. 404.

(*b*) *Tidd v. Lister*, ante, p. 635.

(*c*) *Wright v. Morley*, 11 V. 12, 23, 8 R. R. 69; *Gilchrist v. Cator*, 1 De G. & Sin. 188; *Coster v. C.*, 1 Keen, 199.

(*d*) See *supra*, pp. 634, 636. *Williams'*

Exors. (1893), p. 1282.

(*e*) *Macaulay v. Philips*, 4 V. 19; see also *Scott v. Spashatt*, 3 Mac. & G. 399; *Marshall v. Gibbons*, 4 Ir. Ch. R. 276.

(*f*) See *Tidd v. Lister*, *supra*, p. 635.

(*g*) 39 C. D. 471.

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on his daughter Mrs. S., subject to deduction of any debt due from her. She had married before the date of the will but without any settlement. S. her husband was indebted to the testator 750*l.* and was in very poor circumstances. The question was raised on originating summons whether the trustees could retain or set off the debt against the share of Mrs. S. in the residue. *Kear, J.*, held that as against the right of the husband the executors might retain or set off the debt, but that the wife's equity if asserted was prior to this right, and he settled 500*l.* out of the fund, the balance to be set off against the husband's debt (a).

(a) Following *Carr v. Taylor*, 10 V. 574, 8 R. B. 40, and questioning *Knight v. K.*, 18 Eq. 487, cited (n.) "Husband defaulting Executor," *supra*, p. 637; and see *Ex p. Blagden*, 2 Rose, 294; *Ex p. O'Ferrall*,

1 G. & J. 347; *M'Mahon v. Burchell*, 5 Ha. 325; *Reeve v. Rocher*, 1 De G. & S. 626; *Lee v. Egremont*, 5 De G. & S. 348; *McCormick v. Garnett*, 2 Sm. & Gif. 37; *Re Cordwell's E.*, 20 Eq. 644.

HULME v. TENANT.

1778. Reported 1 Bro. Ch. 16.

Wife's Separate Property.

Bond of a feme covert jointly with her husband, shall bind her separate property.

THE bill was filed by the obligee of a bond, to secure 180*l.* entered into by the defendants, husband and wife, against the husband, wife, and her surviving trustee, to recover the sums secured out of the wife's separate estate.

Upon the marriage, the estates of the wife had been conveyed to trustees; one part, consisting of freehold and leasehold lands, in trust to *receive and pay the rents and profits to the wife for her separate use*, and to convey the estate itself to such use as she, by her last will in writing, or by deed or writing under her hand and seal, executed in the presence of two witnesses, should appoint. in default of appointment, to the use and behoof of her heirs and assigns; other parts to be sold, and out of the produce, 1,000*l.* to be laid out according to the directions of the wife, the interest and profits to be paid to her, and the principal *to her, or her order, by note or writing under her hand*; and for want of such appointment, to her executors, administrators, and assigns.

This 1,000*l.* had been raised, and the whole, or the greatest part applied, so that the question in the cause was with respect to the remedy against the other estate.

In 1769, the husband borrowed of the plaintiff, Mrs. Hulme, 50*l.* upon his and his wife's bond. In 1770, having occasion for a further sum, the wife herself applied to the plaintiff, and borrowed 130*l.*, paid the interest due upon the former sum of 50*l.*, and [the husband and wife] gave a new bond for the 180*l.*

The cause had been heard before Lord *Bathurst*, who dismissed the bill. It came on now to be re-heard.

Mr. *Mansfield* opened for the plaintiff.

Hulme v. Tenant.

Mr. Attorney-General (Wedderburne) and Mr. Selwyn for the defendants.

LORD CHANCELLOR THURLOW.—My doubt arises principally upon the form of the relief, rather than the principles upon which the bill is brought ; it is a bill brought by the obligee upon a joint bond by husband and wife for 150*l.* to recover that sum out of the separate property of the wife. It is brought against the wife, the husband, and the trustees, for attaining the most extensive and perfect relief which the situation of her separate property will enable her or her trustees to afford.

The question is, what sort of execution this Court will award against that separate property? It is created by deed, and is real estate conveyed to trustees, as to a considerable part of it, in trust to receive and pay the rents to the wife, and to convey the estates themselves according to the appointment of the wife, by her last will and testament in writing, or by deed or writing under her hand and seal, executed in the presence of two or more witnesses ; and, for want of such declaration or appointment, to the use and behoof of the wife, her heirs and assigns ; as to other parts, in trust, to be sold, and out of the produce of the sale, 1,000*l.* to be retained by the trustees, to be laid out according to the directions of the wife, the profits to be paid to her, and the principal to her or her order, by note or writing under her hand ; and, for want of such appointment, to her executors, administrators, and assigns.

The rule laid down in *Peacock v. Monk* (a), that a *feme covert* acting with respect to her separate property, is competent to act in all respects as if she was a *feme sole*, is the proper rule, and necessary to support the decisions on this subject. The consequence was that, in *Allen v. Papworth* (b), where a bill was brought by husband and wife for an account, the wife, together with her husband, submitting that the profits of her separate estate should be applied to pay the husband's debts, she was bound by that submission, and the profits of her separate estate were by decree directed to be so applied. In *Grigby v. Cox* (c), where the wife had contracted to sell her separate estate, being authorized by settlement to dispose of it, the Court

(a) 2 V. 190.

(b) 1 V. 163.

(c) 1 V. 517.

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bound her, as a person equally competent as if sole, to a specific performance of that contract : I take it, therefore, it is impossible to say but that a *feme covert* is competent to act as a *feme sole*, with respect to her separate property, where settled to her separate use.

But the question here goes a little beyond that ; it is not only how far she may act upon her separate property : I have no doubt about that ; but the question is, how far her general personal engagements shall be executed out of her separate property. If she had by instrument contracted that this or that portion of her separate estate should be disposed of in this or that way, I think she and her trustees might have been decreed to make that disposition : but if she enters into an engagement, which would make a *feme sole* liable to the whole extent of the contract as to her person, &c., in every respect, it is clear such general engagement, entered into by a *feme covert*, will not bind her as such. It is not like the case of an infant, who is incapable of acting ; but in respect to a *feme covert*, determined cases seem to go thus far, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustee shall be obliged to apply personal estate, and rents and profits when they arise, to the satisfaction of such general engagement ; but this Court has not used any direct process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees, as to personal estate in their hands, or rents and profits, according to the exigencies of justice, or of the engagement of the wife, to be carried into execution. I know of no case which has gone further than that. Suppose the wife to have power, by settlement, to dispose of her real estate to any uses she shall think fit, yet the trustees must make the formal instrument, without which the estate cannot pass. I know of no case where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make conveyance of that real estate, and by sale, mortgage, or otherwise, raise the money to satisfy that general engagement on the part of the wife. It may be difficult to give relief here without doing something of that kind, because that part of the real estate which was to be sold has been sold, and the money has been applied, with the direction of the wife, by the hand of the trustee, who consequently is no longer

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liable as to that sum: so that so far as the 1,000*l.*, it seems out of the reach of this Court, the trustee alleging that the money is paid, or not remaining in his hands.—[Mr. Ambler.—Only part paid over.]—I believe there is no instance of a personal decree against a *feme covert*, for payment of any sum whatever. Though her separate personal property is liable, yet the decree is to fetch forth her separate estate, and make it liable to her engagement. No lease found in the hands of the trustee is now before the Court; we cannot come at it. As a bond it is void, otherwise an extent might have gone.

July 28th, 1778.

LORD CHANCELLOR THURLOW.—I have no doubt about this principle, that, *if a Court of equity says a feme covert may have a separate estate, the Court will bind her to the whole extent as to making that estate liable to her own engagements; as, for instance, for payment of debts, &c.* But, although the remedy here is more extensive than in a court of law, I do not find the Court has ever ordered a power to be executed; it has industriously stopped short of so doing, and has only given a remedy by stopping the fund, where the power was executed; therefore, I cannot order the *feme covert* to execute her power, but I am exceedingly clear that the leasehold estate will be liable.

It stood referred to the Master (a) to take an account of the rents and profits of the leasehold estates; but, before any report, the parties came to a compromise, upon the defendant Frances paying the principal sum borrowed, with interest, without any costs.

NOTES.

1. Separate estate independent of statute.

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1. Separate Estate independent of Statute.

Generally.—"That at *law* (a) a *feme covert* cannot in any way be sued, even for necessities, is certain. Bind herself, or her husband, by specialty, she cannot: and, although living with him, and not allowed necessities, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him: yet, even in respect of these, she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognised than is the *cestui que trust* or the mortgagor, the legal estate, which is the only interest the law recognises, being in others. But in *equity* the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and trustees."

"In former years . . . Judges of what used to be called the Common Law Courts of this realm delighted in applying rigidly and

(a) *Per Brougham, C.*, in *Murray v. Barlee*, 4 My. & K. 220, 222.

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strictly a series of rules and maxims which their predecessors had delighted themselves in devising, although they did not always commend themselves to the apprehension of the million. Amongst those maxims was one by which a married woman was held incapable of taking a gift either from her husband or a stranger But the Court of Chancery (a very great Court in its day, although it has now ceased to exist) invented that blessed word and thing 'the separate use of a married woman' (a). And in order to prevent any undue exercise of marital influence detrimental to its enjoyment, Courts of equity have also in comparatively recent times allowed the introduction of a restraint upon her anticipation or alienation of property so settled—the separate use and the restraint upon anticipation or alienation being both *co-extensive with her coverture*. And this equitable doctrine of separate use has been extended by the various statutes hereinafter referred to.

The jurisdiction of the Court of Chancery is now transferred to the High Court of Justice (b), all equitable rights are to be recognised by all the Courts, and where there is any conflict or variance between the rules of equity and the rules of the common law, the former are to prevail (c).

Any person may, either before, after, or during her coverture, give or settle property to the separate use of a *feme*.

And her husband may contract (as is frequently the case in marriage settlements), that either his own or his wife's property, or part of it, shall be held, usually by trustees, for her separate use.

A *parol agreement*, however, before marriage, that particular chattels of the wife shall be possessed by her to her separate use, is not binding upon the husband, unless the agreement be acted upon by the chattels being placed under the dominion of a trustee, and treated as separate property, for in such case the agreement may be made effectual (d). In *The p. Whitehead* (e), by a parol antenuptial settlement it was agreed between the persons about to marry that a sum of money standing to the future wife's credit on deposit at her bankers in her maiden name should be retained by her for her separate use, and after the marriage the money was allowed by the husband to remain in his wife's former name, and he allowed her to draw cheques upon it, the C. A. held that the inference was that the husband gave the money to the wife, and that he became

(a) Per James, L.J., *Ashworth v. 11.*
Outram, 5 C. D., p. 941.

(b) Judicature Act, 1873, s. 16.

(c) *Ibid.*, s. 24, s.s. 2, 4; s. 25, s.s.

(d) *Simmons v. S.*, 6 Ha. 352;

Cooper v. Wornald, 7 B. 266.

(e) 14 Q. B. D. 419.

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her trustee, and that it was unnecessary to consider the 4th section of the Statute of Frauds upon which the case had turned in the Court below (a).

If real or personal property be given to, or settled upon a married woman for her separate use, without the interposition of trustees, still in equity the intention of the testator or settlor will be effectuated, and the wife's interest protected by the conversion of the husband into a trustee for her (b).

A husband may also give property to trustees, or make himself a trustee for the separate use of his wife. But in order to constitute a gift between husband and wife, there must be a clear and irrevocable gift to a trustee for the wife, or some clear and distinct act by the husband, by which he has divested himself of his property, or engaged to hold it as a trustee for his wife (c), a mere imperfect gift as distinguished from and not amounting to a declaration of trust, not being sufficient for the purpose (d).

And it has been recently held that in the absence of proof of an unequivocal, complete, and final intention on the part of a husband to constitute himself a trustee for his wife, the Court will not after his death, upon her uncorroborated statement that he expressly authorised her to carry on a business, on her own account, of a farm which she had rented before marriage, and to treat the proceeds as her separate property, admit her claim as against his estate to the proceeds of the farm which were invested by him during his lifetime (e). See further as to this alleged rule of corroborative evidence *Re Finch* (f); but *Brett, M.R.*, in *Re Garnett* (g), and *Hannen, J.*, in *Re Hudgson* (h), strongly disapprove it.

Under the Conveyancing and Law of Property Act, 1881, s. 50, freehold land or a thing in action may now be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

(a) And see *Re Wood*, 61 L. T. 197.

(b) *Parker v. Brooke*, 9 V. 583, 7 R. R. 299; *Rich v. Cockell*, 9 V. 369, 7 R. R. 227; per *James, L.J.*, *Ashworth v. Outram*, 5 C. D., p. 941; *Exp. Sibeth*, 14 Q. B. D. 417; and see *Wassal v. Leggatt*, (1896) 1 Ch. 554.

(c) *Mews v. M.*, 15 B. 529; *Parker v. Lechmere*, 12 C. D. 286; *Cowper's Case*, cited *Graham v. Londonderry*, 3 Atk. 393; *Walter v. Hodge*, 2 Swans. 92; *Ashworth v. Outram*, 5

C. D. 923; *Lovell v. Newton*, 4 C. P. D. 7.

(d) *Re Breton's Estate*, 17 C. D. 416; *Milroy v. Lord*, 4 De G. F. & J. 264; and see note to *Ellison v. E.*, ante.

(e) *Re Whittaker*, *Whittaker v. W.*, 21 C. D. 657.

(f) 23 C. D., p. 271.

(g) 31 C. D., p. 9.

(h) *Ibid.*, p. 183.

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And the fee simple of a wife may be affected by a trust for her separate use in three ways: (1) by conveyance to a trustee, or a declaration of trust before marriage, with the husband's consent; (2) by an agreement between the intended husband and wife before marriage; (3) by an acknowledged assurance by a wife after marriage.

But the agreement (2) must be in *writing and signed by the wife* as well as the husband, for if it is signed by the husband alone, it is, owing to the Statute of Frauds, sect. 7, invalid as a declaration of trust for the separate use of the fee simple, a husband having in his wife's land only an estate for the joint lives of himself and his wife with a possible estate by the curtesy; and upon the death of the wife without issue during her husband's lifetime, her heir-at-law, and not her devisee, will be entitled to the land of which she is seised in fee simple (*a*). And a mere renunciation by an intended husband of his marital rights in his wife's real property is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee (*b*).

A wife will have the benefit of any outlay by her husband upon real estate settled to her separate use. If, for instance, he builds houses upon it with his own money, the houses so built will become the wife's, and her interest in them will be to her separate use (*c*).

What Words are sufficient to Create a Separate Use.—No particular *form of words* is necessary in order to vest property in a married woman to her separate use (*d*). It has been held that the marital rights of the husband will be defeated if there is a gift or settlement of property to his wife or her trustees for her "separate use" (*e*); "sole and separate use" (*f*); or "for her own use and at her own disposal" (*g*); "for her sole use and disposal" (*h*); "for her own use, independent of her husband" (*i*); "for her own use and benefit, independent of any other person" (*k*); "for her livelihood" (*l*); a bequest to a

(*a*) Dye v. D., 13 Q. B. D. 147.

(*b*) Ibid.

(*c*) Barrack v. McCulloch, 3 Kay & J. 119, 120; Grant v. G., 34 B. 623.

(*d*) Stanton v. Hall, 2 Russ. & M. 180; *Re* Peacock's T., 10 C. D. 497.

(*e*) Massy v. Rowen, 4 L. R. II. L. 294, 299, 300.

(*f*) Parker v. Brooke, 9 V. 583, 7 R. R. 299; Archer v. Rorke, 7 Ir. Eq.

R. 478; and see Hulme v. Tenant, *supra*.

(*g*) Pritchard v. Amos, 1 T. & R. 222.

(*h*) Bland v. Dawes, 17 C. D. 794.

(*i*) Wagstaffe v. Smith, 9 V. 520.

(*k*) Margetts v. Barringer, 7 Si. 482; Glover v. Hall, 16 Si. 568.

(*l*) Darley v. D., 3 Atk. 399; Cape v. C., 2 Y. & C. Ex. Ca. 543; but see Lee v. Pricaux, 3 Bro. Ch. 383; Wardle v. Claxton, 9 Si. 324.

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married woman "for her absolute use and benefit" (a); or, "that she should receive and enjoy the issue and profits" (b); a direction that "the interests and profits be paid to her, and the principal to her, or to her order by note in writing under her hand" (c); or, "her receipt to be a sufficient discharge" (d); or where trustees are directed to apply the income of a fund in their discretion, and without being answerable to any one "for the maintenance and support of a married woman" (e); or, "to be delivered to her on demand" (f); or where the husband "is to have no control" (g).

In the case, however, of *Gilbert v. Lewis* (h), it was held by *Westbury, C.*, that a devise to a widow "for her sole use and benefit" without the intervention of trustees did not give her a separate estate. It may now be considered to be established by that case, followed by *Lewis v. Matthews* (i), and by *Massy v. Raven* (k), that the word "sole" in a will has not a fixed technical meaning like the word "separate," and will not of itself exclude the marital right (l). For although the primary and grammatical meaning of the word "sole" does signify exclusion, the real question to be solved is, exclusion of whom? When the woman is unmarried, and the instrument does not in terms, or from the circumstances, point this expression to a future coverture, the exclusion is now settled to be of others in general, and, therefore, not to apply with the required particularity to an after-taken husband. But if the woman is married, the exclusion most natural to occur to the mind of the donor, aware of her coverture, is that of the husband; and he can be excluded only by holding the property to be to the separate use of the wife (m). So a settlement for the "sole use, benefit, and disposition" of a lady about to marry (n); a bequest to a lady about to marry, "for her own sole use and benefit absolutely" (o); and a

(a) *Negus v. Jones*, 1 C. & E. 52.

(b) *Tyrell v. Hope*, 2 Atk. 558.

(c) *Hulme v. Tenant*, supra.

(d) *Lee v. Prieaux*, 3 Bro. Ch. 381; *Stanton v. Hall*, supra; *Re Molyneux's Estate*, 6 Ir. R. Eq. 411; *Re Lorimer*, 12 B. 521; *Surman v. Wharton*, (1891) 1 Q. B. 491.

(e) *Austin v. A.*, 4 C. D. 233; *Re Peacock*, 10 C. D. 490.

(f) *Dixon v. Ohnius*, 2 Cox, 414.

(g) *Edwards v. Jones*, 14 W. R. (M. R.) 815.

(h) 1 De G. J. & S. 38.

(i) 2 Eq. 177.

(k) L. R. 4 H. L. 288.

(l) See also *Green v. Marsden*, 1 Drew. 646; *Farrow v. Smith*, W. N. 21; *Re Amies*, W. N. (50) 61.

(m) *Hartford v. Power*, 2 Ir. R. Eq. 212.

(n) *Ex p. Ray*, 1 Madd. 199, 207; and see *Arthur v. A.*, 11 Ir. Eq. R. 511.

(o) *Re Tarsey's Trust*, 1 Eq. 561.

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bequest in a will by the words "solely and entirely for her own use and benefit for life," to a married woman (a), gave to them separate estates. And a bequest to an *unmarried* woman "for her own sole use and benefit" absolutely, has been held to give her a separate estate, because the testator, in another clause in his will, *showed he contemplated there a future marriage* of the lady, though in the bequest itself there was no reference of any kind to that event (b). And the interposition of trustees *may* give to such words as "sole benefit" the same technical meaning as the word "separate" (c).

And words apparently confining the operation of the separate use clause to members of a class married at the death of the testator, may, by the context, be extended so as to include those married subsequently. Thus, where a testatrix directed "that the legacies and shares of such of my nieces as *are* married shall be to their separate use, free from the debts and control of *any* husband; and that my trustees *shall have* power to give effect to this my intent," *Shadwell*, V.-C., held that the testatrix had used the words in a future sense, and that she intended those of her nieces who married after her death, as well as those who were married at that time, should take to their separate use (d). Where a testator, after giving his residuary property to two nieces, added, "I confine my said legacies hereinbefore mentioned, to be given to my nieces and their children, *without comprehending their husbands*, unless they, my said nieces or either of them, should die without issue;" *Romilly*, M.R., was of opinion that the only way to give effect to these words was to give the residue between the nieces equally for their *separate* use for life, and after their deaths to their children, and if they had no children, then to the nieces absolutely (e).

Where a testatrix devised a freehold estate to trustees for the use and benefit of her daughter, who was to receive the rents and profits from the tenants herself, while she lived, whether married or single, and she also directed that *no sale or mortgage should be made* of the estate or the rents arising from it during the life of her daughter, it was held by the C. A. that the devise amounted to a gift to the *sepa-*

(a) *Inglefield v. Coghlan*, 2 Coll. Ch. R. 247; *Re Amies*, W. N. (80) 16; *Bland v. Dawes*, 17 C. D. 794; and see *Green v. Britten*, 1 De G. J. & S. 649; *Hartford v. Power*, 2 Ir. R. Eq. 204.

(b) See also *Ex p. Killick*, 3 Mont.

D. & De G. 480; *Re Tarsey*, 1 Eq. 561.

(c) *Adamson v. Armitage*, 19 V. 416; *Gilbert v. Lewis*, 1 De G. J. & S. 38; but cf. *Massy v. Rowen*, L. R. 4 H. L. 288.

(d) *Re Bayliss's T.*, 17 Si. 178.

(e) *Dawson v. Bourne*, 16 B. 29.

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rate use of the daughter *without power of anticipation* inasmuch as the expressions therein used were inconsistent with any interference on the part of the husband (a). An indefinite bequest of the *interest* of a fund to a woman to her separate use, will give to her the *capital* also to her separate use (b). So a bequest of a sum of money to a married woman for her own use, *nevertheless* during her life, the executors were to invest the sum and to pay the dividends during her life to her separate use, independent of any husband, was held to give her an absolute and not merely a life interest (c).

In *Troutbeck v. Boughey* (d) a testator gave all his real and personal estate to trustees in trust for his wife for life, and after her decease for his daughter absolutely; and he directed that the principal moneys, rents, issues, profits, interest, dividends, and proceeds which his wife and daughter, or either of them, should be entitled to under his will, should be paid into their own proper hands as the same became due, and not by way of anticipation; and should be for the separate use and benefit of his wife and daughter; and for which moneys, rents, issues, profits, interest, dividends, or proceeds, the receipt alone of his wife and daughter, whether covert or sole, should be an effectual discharge to his trustees, *Kindersley, V.-C.*, held that the corpus of the real estate was not given to the separate use of the testator's daughter.

Although generally a married woman's separate estate is given to her *for life only*, she may have an *absolute interest* in personal property, or any ordinary estate in real estate, such as an estate in fee simple (e) or fee tail (f) settled to her separate use; and where property is settled to a married woman's separate use for life with power to dispose of it by deed or will, and, in default to her, her executors and administrators, it is, in effect, her separate property absolutely (g).

As to the exclusion of the marital right by a French settlement, see *Este v. Smythe* (h).

What Words are not sufficient.—It has been held that no separate use has been created where there is a mere direction "to pay to a

(a) *Goulder v. Camm*, 1 De G. F. & J. 146.

(b) *Humphrey v. H.*, 1 Si. (N. S.) 536.

(c) *Gurney v. Goggs*, 25 B. 334.

(d) 2 Eq. 534; and see *Re Bown*, 27 C. D. 411; *Johnson v. J.*, 35 C. D., p. 349.

(e) *Taylor v. Meads*, 4 De G. J. & S. 597, 607.

(f) *Cooper v. Macdonald*, 7 C. D. 288.

(g) *The London Chartered Bank of Australia v. Lemprière*, 4 L. R. P. C. C. 572. See Part 4, *infra*, p. 685.

(h) 18 B. 112.

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married woman and her assigns" (a); or there is a gift "to her use" (b); "to her own use and benefit" (c); to her "absolute use" (d); unless the context requires the words "absolute use" to be construed as "separate use" (e); or when a payment is directed to be made "into her own proper hands, to and for her own use and benefit" (f); into her proper hands "to her own proper use and benefit" (g); or when property is "to be under her sole control" (h) or where there is a devise without the intervention of trustees, "for her sole use and benefit" (i); or a direction to transfer "to own use and benefit" (k). So, a bequest to a woman and her assigns for her life, "for her and *their* own absolute use and benefit," does not confer upon her a separate estate" (l). And a bequest by will to the testator's wife for life of the income of property, "to be expended by her as she might think fit and proper and agreeable to her free will and pleasure," has been held not to give her a separate use in the same (m).

And where a testator gave 1,000*l.* to his sister for her, *or* for her children's *sole* use and benefit for ever, and directed his executors to pay the same to her as soon as possible, it was held that the sister did not take the 1,000*l.* to her separate use (n).

Separate Estate by Implication.—Where under a trust deed for providing pensions (amongst other objects) for the widows of clerks in the East India Company's service, there was a provision that the pension should be paid "to provide a comfortable maintenance" for the widows, and that it "should not be disposed of or incumbered

(a) *Dakins v. Berisford*, 1 Ch. Ca. 183.

194; *Lumb v. Milnes*, 5 V. 517.

(b) *Jacobs v. Amyatt*, 1 Madd. 376, n.

(c) *Johnes v. Lockhart*, cited 3 Bro. Ch. 383, n.; *Wills v. Sayers*, 4 Madd. 409; *Roberts v. Spicer*, 5 Madd. 491; *Kensington v. Dollond*, 2 My. & K. 184; *Beales v. Spencer*, 2 Y. & C. C. C. 651; *Taylor v. Stainton*, 2 Jur. (N. S.) 634.

(d) *Rycroft v. Christy*, 3 B. 238; but see *Negus v. Jones*, 1 C. & E. 52.

(e) *Shewell v. Dwaris*, John. 172; *Re Turner*, 66 L. T. 758.

(f) *Tyler v. Lake*, 2 Russ. & My.

(g) *Blacklow v. Laws*, 2 Ha. 49; but see *Hartley v. Hurle*, 5 V. 545; *Negus v. Jones*, 1 C. & E. 52.

(h) *Massey v. Parker*, 2 My. & K. 174.

(i) *Gilbert v. Lewis*, 1 De G. J. & S. 38; *Lewis v. Matthews*, 2 Eq. 177; *Massy v. Rowen*, L. R. 4 H. L. 288.

(k) *Darcy v. Croft*, 9 Ir. Ch. R. 19, 31.

(l) *Rycroft v. Christie*, 3 B. 238.

(m) *Re Graham's T.*, 20 W. R. 289.

(n) *Chipehase v. Simpson*, 16 Si. 485.

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either directly or indirectly," it was held by *Malins*, V.-C., that a widow of a clerk was, as against a second husband, entitled to her pension to her separate use (*a*).

Where a husband in taking proceedings with reference to property of his wife's makes her a defendant, he thereby admits that the property is her separate estate (*b*). But a separate use will not be inferred merely from a restraint on anticipation (*c*).

Where a precatory trust has been created by will in favour of "children" *simpliciter*, the trustee may, in executing the trust, limit the shares of the daughters to their separate use (*d*).

A married woman under her equity to a settlement, may have her property, which her husband was entitled to receive *jure mariti*, or which he could only recover in a Court of equity, settled to her separate use and to the use of her children (*e*).

Equitable Assets.—The separate property of a married woman is "equitable assets," and her creditors are paid thereout *pari passu* (*f*); there is therefore no right of retainer in her executor (*g*).

Arrangements or Agreements between Husband and Wife.—If a husband either expressly or impliedly agrees that his wife shall carry on a business for her own benefit separately from and independently of him, which is always a question dependent on the facts of each case, then the trade becomes her separate property, and everything that is incident to and connected with the trade becomes part of that separate trade, and the husband is, if and so far as it is necessary, a trustee of everything which was devoted to that trade of which he allowed the wife to be the separate owner (*h*). And it is immaterial whether the business were one which the wife had before marriage or one which she had established after the marriage with the consent of her husband (*i*), or which she had established before and carried on after (*k*), or that the business was one carried on

(*a*) *Re Peacock's T.*, 10 C. D. 490.

(*b*) *Earl v. Ferris*, 19 B. 67; *Re Martin*, *Butterfield v. Mott*, W. N. (84) 164; *Baker v. Newton*, 2 B. 112.

(*c*) *Stogdon v. Lee*, (1894) 1 Q. B. 661.

(*d*) *Willis v. Kymmer*, 7 C. D. 181.

(*e*) *Roberts v. Cooper*, (1891) 2 Ch., p. 348.

(*f*) *Silk v. Prime*, see vol. ii., *infra*; *Owen v. Dickenson*, Cr. & Ph. 48;

Johnson v. Gallagher, 13 De G. F. & J. 494; *London Chartered Bank v. Lemprière*, 4 P. C. 572, 594.

(*g*) *Re Poole's Estate*, 6 C. D. 739; but *quare* whether this is so under Married Women's Property Act, 1882. See s. 23.

(*h*) *Ashworth v. Outram*, 5 C. D. 923; *Pearse v. P.*, 22 W. R. 69; *Slanning v. Style*, 3 P. W. 334.

(*i*) *Ashworth v. Outram*, *supra*.

(*k*) *Re Dearmer*, 53 L. T. 505.